No. 17-646	
Title:	Terance Martez Gamble, Petitioner v. United States
Docketed:	November 2, 2017
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-16760)
Decision Date:	July 28, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 24 2017	Petition for a writ of certiorari filed. (Response due December 4, 2017)
Nov 30 2017	Order extending time to file response to petition to and including January 3, 2018.
Nov 30 2017	Motion to extend the time to file a response from December 4, 2017 to January 3, 2018, submitted to The Clerk. Main Document
Dec 04 2017	Brief amici curiae of Constitutional Accountability Center and Cato Institute filed. Main Document Proof of Service Certificate of Word Count
Dec 26 2017	Motion to extend the time to file a response from January 3, 2018 to February 2, 2018, submitted to The Clerk. Main Document
Dec 28 2017	Motion to extend the time to file a response is granted and the time is further extended to and including February 2, 2018.
Jan 16 2018	Brief of respondent United States in opposition filed. Certificate of Word Count Main Document
Jan 30 2018	Reply of petitioner Terance Gamble filed. Main Document Certificate of Word Count Proof of Service
Mar 21 2018	DISTRIBUTED for Conference of 4/13/2018.

Apr 16 2018	DISTRIBUTED for Conference of 4/20/2018.
Apr 23 2018	DISTRIBUTED for Conference of 4/27/2018.
May 07 2018	DISTRIBUTED for Conference of 5/10/2018.
May 14 2018	DISTRIBUTED for Conference of 5/17/2018.
May 21 2018	DISTRIBUTED for Conference of 5/24/2018.
May 29 2018	DISTRIBUTED for Conference of 5/31/2018.
Jun 04 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 27 2018	DISTRIBUTED for Conference of 6/27/2018.
Jun 28 2018	Petition GRANTED.
Jul 23 2018	Motion for an extension of time to file the opening briefs on the merits filed. **Main Document**
Aug 01 2018	Motion for an extension of time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 4, 2018. The time to file respondent's brief on the merits is extended to and including October 25, 2018.
Sep 04 2018	Brief of petitioner Terance Gamble filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 04 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Other**
Sep 07 2018	Brief amicus curiae of Howard University School of Law Thurgood Marshall Civil Rights Center in support of neither party filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 10 2018	Brief amici curiae of Law Professors filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of U.S. Navy-Marine Corps Appellate Defense Division, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Constitutional Accountability Center, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Criminal Defense Experts filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of The Rutherford Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Criminal Procedure Professors Stephen E. Henderson, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Senator Orrin Hatch filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	SET FOR ARGUMENT on Wednesday, December 5, 2018
Oct 15 2018	Record requested from U.S.C.A. 11th Circuit.
Oct 18 2018	Record received from the U.S.D.C. Southern Dist. of Alabama is electronic and located on PACER.
Oct 19 2018	CIRCULATED
Oct 25 2018	Brief of respondent United States filed. (Distributed) **Certificate of Word Count** **Main Document**
Oct 29 2018	Record received from the U.S.C.A. 11th Circuit is electronic, complete and located on PACER.
Nov 01 2018	Brief amici curiae of Texas, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 01 2018	Motion for leave to participate in oral argument as amici curiae and for

	enlargement of time for oral argument filed by Texas, et al. **Main Document** **Proof of Service**
Nov 01 2018	Brief amici curiae of National Association of Counties, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other** **Other**
Nov 01 2018	Brief amici curiae of National Indigenous Women's Resource Center et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 05 2018	Opposition of petitioner to motion of Texas, et al., filed. **Main Document** **Proof of Service**
Nov 06 2018	Response of respondent to motion of Texas, et al., filed. **Main Document** **Proof of Service**
Nov 06 2018	Reply of Texas, et al. in support of motion, filed. **Main Document** **Proof of Service**
Nov 19 2018	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for enlargement of time for oral argument is GRANTED and the time is allotted as follows: 40 minutes for the petitioner, 30 minutes for the respondent, and 10 minutes for Texas, et al.
Nov 20 2018	Letter of respondent United States filed. (Distributed) **Main Document**
Nov 21 2018	Reply of petitioner Terance Gamble filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 03 2018	RESCHEDULED FOR ARGUMENT ON Thursday, December 6, 2018
Dec 06 2018	Argued. For petitioner: Louis A. Chaiten, Cleveland, Ohio. For respondent: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For Texas, et al., as amici curiae: Kyle D. Hawkins, Texas Solicitor General, Austin, Tex.

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RECORD AND BRIEFS

17-646

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No. _____

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

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PETITION FOR A WRIT OF CERTIORARI

Terance Martez Gamble respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 694 F. App'x 750. The District Court's opinion denying Gamble's motion to dismiss is not published, but it is available at 2016 WL 3460414.

JURISDICTION

The Eleventh Circuit entered judgment on July 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

The Fifth Amendment enshrines a promise that "No person shall . . . be twice put in jeopardy" "for the same offence." Yet Terance Martez Gamble has been subjected to exactly that: two convictions, and two sentences, for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of

his life behind bars. The Double Jeopardy Clause prohibits that result.

The fact that Gamble's sentences were imposed by separate sovereigns—Alabama and the United States—should make no difference. The court-manufactured "separate sovereigns" exception—pursuant to which his otherwise plainly unconstitutional duplicative conviction was upheld—is inconsistent with the plain text and original meaning of the Constitution, and outdated in light of incorporation and a vastly expanded system of federal criminal law. For precisely these reasons, Justices Ginsburg and Thomas have called for "fresh examination" of the exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring); *see also id.* ("The [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA."). And courts and commentators have agreed that the exception's time has come.[1]

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[1] *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting) (rejecting the proposition that "a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State"); *United States v. Wilson*, 413 F.3d 382, 394 (3d Cir. 2005) (Aldisert, J., dissenting) ("The time has come for the Supreme Court to revisit the issue[.]"); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (arguing that the exception "is in need of serious reconsideration"); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 17, 23 & n.102 (1997) (encouraging this Court to "abolish the dual sovereign exception" and collecting legal commentary to the same effect).

But, as is often the case when binding precedent from this Court forecloses a line of argument, cases raising this issue have been few and far between. And those few to have raised it have been riddled with vehicle problems. *See, e.g.*, *Walker v. Texas*, 137 S. Ct. 1813 (2017) (denying certiorari).

Until now. This case cleanly and squarely presents the question two members of this Court have already evinced an intent to review. And Terance Gamble ought not be made to serve three more years in prison in violation of his constitutional rights. This Court should grant certiorari, overrule the separate-sovereigns exception, and restore the original meaning of the Double Jeopardy Clause.

STATEMENT OF THE CASE

1. In 2008, Terance Gamble was convicted of second-degree robbery in Mobile County, Alabama. C.A. App. 12, 37. Because second-degree robbery is a felony offense, both federal and state law forever barred him from possessing a firearm.

2. More than seven years later, on November 29, 2015, Gamble was driving in Mobile when a police officer pulled him over for a faulty tail light. *See* C.A. App. 49–50. The officer smelled marijuana coming from Gamble's car and, after searching it, discovered two baggies of marijuana, a digital scale, and a 9mm handgun. *Id.*

3. Alabama prosecuted Gamble for possessing marijuana and for being a felon in possession of a firearm. The State's felon-in-possession statute, under which Gamble was convicted, "prohibits a convicted felon from possessing a pistol." *Ex parte*

Taylor, 636 So. 2d 1246, 1246 (Ala. 1993); *see* Ala. Code §§ 13A-11-70(2), 13A-11-72(a); Pet. App. 5a-6a. Gamble received a one-year sentence, which he finished serving on May 14, 2017.

4. While the State's prosecution was ongoing, the federal government charged Gamble for the same offense under federal law: being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). The federal statute prohibits convicted felons from "possess[ing] in or affecting commerce[ ] any firearm." *Id.* The government based this charge on "the same incident of November 29, 2015 that gave rise to his state court conviction." Pet. App. 6a; *see also* C.A. App. 12.

Gamble raised one and only one objection to his federal prosecution: that it violated his "Fifth Amendment [right] against being placed twice in jeopardy for the same crime." C.A. Supp. App. 10. And he moved to dismiss his federal indictment on that ground. *Id.*

The District Court, in a thorough opinion, denied Gamble's motion (as it was bound to do) on the basis of this Court's separate-sovereigns exception. "[U]nless and until the Supreme Court overturns" that doctrine, the District Court reasoned, "Gamble's Double Jeopardy claim must likewise fail." Pet. App. 10a.

Gamble then entered a conditional guilty plea, specifically preserving his right to appeal the District Court's denial of his double-jeopardy claim. C.A. App. 33, 45–46. He was sentenced to 46 months' imprisonment, a three-year period of supervised release, and a $100 assessment. *Id.* at 15–20. He is set to be released from federal prison on February 16,

2020—nearly three years after he would have been released from state prison.

5. Gamble appealed the "issue preserved in writing in his Plea Agreement and preserved on the record at his Plea Hearing"—namely, whether the federal prosecution violated "his rights pursuant to the Double Jeopardy clause of the Fifth Amendment." C.A. Supp. App. 12. The Eleventh Circuit issued a *per curiam* opinion affirming the decision below. "[U]nless and until the Supreme Court overturns" the separate-sovereigns exception, the court reasoned, Gamble's "double jeopardy claim must fail." Pet. App. 9a.

This petition followed.

REASONS FOR GRANTING THE PETITION

The separate-sovereigns exception to the Double Jeopardy Clause should be overruled. Indeed, the exception flunks every test of constitutional interpretation. It has no basis in the text of the Fifth Amendment. It is inconsistent with the Clause's original meaning, which derived from a long common-law tradition that explicitly extended to prosecutions by separate sovereigns. It is irreconcilable with the Clause's driving purpose, which is to ensure finality by protecting individuals from the threat or reality of successive prosecutions. And it distorts foundational precepts of federalism, pursuant to which our system of dual sovereignty is supposed to protect individual liberty rather than take it away.

Nor should considerations of *stare decisis* stand in the way. The separate-sovereigns exception's doctrinal premise—that the Double Jeopardy Clause did not apply to the States—eroded away when the

Clause was incorporated. And its factual premise—that duplicative federal-state prosecutions would be exceedingly rare in light of the narrow scope of federal criminal law—no longer holds. These sorts of doctrinal and factual changes are classic grounds for reconsidering legal doctrines that, like this one, have outlasted their foundations.

This case presents the ideal vehicle for reconsidering the separate-sovereigns exception. Gamble took great care to preserve this issue at every step of the way. And no other procedural or substantive obstacle impedes this Court's review. That is no small thing, as a clean vehicle for revisiting this question has proven hard to come by.

In sum, the separate-sovereigns exception to the Double Jeopardy Clause "bears fresh examination." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring), and this is the "appropriate case" in which to do it. *Id.*

I. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED.

A. The Separate-Sovereigns Exception Is Inconsistent with the Plain Text, Original Meaning, and Purpose of the Constitution.

1. The text of the Double Jeopardy Clause of the Fifth Amendment provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Clause admits of no distinctions based on the identity of the prosecuting entity. To the contrary, it unambiguously protects each "person" from duplicative prosecutions—regardless of their source.

2. Evidence of the Clause's original meaning overwhelmingly supports this reading. The Double Jeopardy Clause has its origins in "this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 329 (1768). The Founders took the core promise of the Clause as a given: "[T]he courts of justice," they assumed, "would never think of trying and punishing twice for the same offence." 1 Annals of Cong. 753 (1789) (statement of Representative Roger Sherman). To the contrary, "it [was] the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* (statement of Representative Samuel Livermore).

The rule "that an acquittal or conviction by a court of competent jurisdiction abroad"—*i.e.*, by a separate sovereign—"is a bar to a prosecution for the same offense in England had been definitely settled . . . prior to the American revolution." J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8 (1956); *see also, e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* 515, 522 (John Curwood ed., 8th ed. 1824) (explaining that double-jeopardy protections apply to prosecutions "in any court whatsoever"). Accordingly, an acquittal or conviction in, say, Portugal or Wales, had long barred a subsequent prosecution in England. *See King v. Hutchinson* (1678) 84 Eng. Rep. 1011, 1011 (Portugal); *King v. Thomas* (1664) 83 Eng. Rep. 326, 327 (Wales). Indeed, early decisions by this Court appeared to recognize the common-law doctrine's

application to prosecutions by separate sovereigns. *See Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) ("The exercise of this jurisdiction by a State Court Martial would either oust the United States' Courts of their jurisdiction, or might subject the alleged delinquents to be twice tried and punished for the same offence.").

The Double Jeopardy Clause was meant to codify this broad common-law doctrine in which a separate-sovereigns exception had no place. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873) (explaining that the purpose of the Clause is "to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").

3. The purpose of the Double Jeopardy Clause likewise extends to prosecutions by separate sovereigns. At its core, the Clause reflects a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). To that end, it protects individuals "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Id.* at 187–88; *see also Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield

individuals from the harassment of multiple prosecutions for the same misconduct.").

The separate-sovereigns exception cannot be reconciled with that motivating purpose. To the contrary, permitting consecutive prosecutions for the same offense whenever those prosecutions are initiated by different sovereigns implicates the very finality and fairness concerns the Clause was designed to address. After all, "[i]f double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting); *see also Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (explaining that the separate-sovereigns exception "hardly serves" the Double Jeopardy Clause's "objective"). The exception forces defendants like Gamble—who have already been convicted or acquitted of an offense—to " 'run the gauntlet' a second time." *Abney v. United States*, 431 U.S. 651, 662 (1977). That is precisely the result the Double Jeopardy Clause was designed to prevent.

4. What is more, the separate-sovereigns exception runs afoul of foundational concepts of federalism. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " *Bond v. United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). In other words, our system of dual sovereignty was meant to "secure[ ] to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 221 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)); *see also* The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003)

(explaining that division of power "between two distinct governments" would afford "a double security . . . to the rights of the people").

The separate-sovereigns exception turns federalism on its head. The mechanism through which federalism enhances liberty was, to the Founders, straightforward: "The different governments will control each other, at the same time that each will be controlled by itself." *Id.* In the teeth of the separate-sovereigns exception, however, dual sovereignty does precisely the opposite: It permits different governments "to do together what . . . neither can do separately"—all to the detriment of individual liberty. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

Gamble's is a case in point. Far from enhancing his freedoms and securing his liberty, the constitutional division of sovereign power has cost him three years of his life. After all, had the "atom of sovereignty" never been split, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), Gamble's dual convictions would never have been possible and he would be a free man today. That result is incompatible with the text of the Double Jeopardy Clause, with the Clause's original meaning, and with the original purpose of the Clause and federalism more broadly.

B. The Separate-Sovereigns Exception's Doctrinal and Factual Underpinnings Have Eroded.

1. True, this Court has previously endorsed the separate-sovereigns exception. But "*stare decisis* cannot possibly be controlling when . . . the decision

in question has . . . [had] its underpinnings eroded . . . by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Put differently, *stare decisis* must give way when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992).

Those standards could have been written for this case. The separate-sovereigns exception's original doctrinal "underpinnings," *Gaudin*, 515 U.S. at 521—the jurisprudential assumption that the Double Jeopardy Clause did not apply to the States—dissolved when this Court incorporated it. And incorporation of other constitutional provisions has led this Court to overrule separate-sovereigns exceptions in other contexts, leaving this one an outlier "remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

a. The separate-sovereigns exception has its origins in this Court's 1847 decision in *Fox v. Ohio*, 46 U.S. 410 (1847). That case marked the Court's first intimation that state and federal governments could separately prosecute the same offense. *Id.* at 434–35. The decision, which predated the Fourteenth Amendment, relied on *Barron v. Baltimore*, 32 U.S. 243 (1833), which had held that the Bill of Rights did not apply to the States. *See Fox*, 46 U.S. at 434–35. The Double Jeopardy Clause would not bar duplicative state and federal convictions because, the Court reasoned, the Clause was "exclusively [a] restriction[ ] upon federal power." *Id.* at 434.

In subsequent cases, the Court relied on *Fox* in adopting and refining early versions of the separate-sovereigns exception. *See, e.g.*, *Moore v. Illinois*, 55 U.S. 13, 20 (1852); *United States v. Lanza*, 260 U.S. 377, 378–79, 382–83 (1922). The doctrine fully crystallized in a pair of 1959 cases, *Bartkus*, 359 U.S. 121, and *Abbate*, 359 U.S. at 196, which blessed, respectively, state prosecution following a federal conviction and federal prosecution following a state acquittal. Although *Bartkus* and *Abbate* postdated adoption of the Fourteenth Amendment, this Court had already rejected the notion that the passage of that Amendment had incorporated the Double Jeopardy Clause against the States. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937). And, as in *Fox*, the absence of any double-jeopardy limitation for the States was a key premise of the Court's rulings. *See Bartkus*, 359 U.S. at 124 ("[T]he Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments[.]"); *Abbate*, 359 U.S. at 194 ("The Fifth Amendment . . . applies only to proceedings by the Federal Government[.]").[2]

The separate-sovereigns line of authority, accordingly, is deeply rooted in the absence of a double-jeopardy bar for the States. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law*

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[2] In occasionally applying the exception since *Abbate*, the Court has simply assumed, without squarely deciding, that the exception remains valid. *See Sanchez Valle*, 136 S. Ct. at 1870; *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985); *United States v. Wheeler*, 435 U.S. 313, 321–22 (1978); *Waller v. Florida*, 397 U.S. 387, 394 (1970).

After Rodney King, 95 COLUM. L. REV. 1, 11 (1995) ("[T]he logic of [*Barron*] furnished an important justification for the early dual sovereignty doctrine[.]").

b. In 1969, however, the Court vaporized the doctrinal underpinnings of the separate-sovereigns exception when it incorporated the Double Jeopardy Clause against the States. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969). "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," the Court held, so it "should apply to the States through the Fourteenth Amendment." *Id.* at 794.

With the Clause now applicable to the States, nothing of the separate-sovereigns exception's "important predicate" remained. *United States v. Grimes*, 641 F.2d 96, 101–02 (3d Cir. 1981). To the contrary, the logic of incorporation is incompatible with such an exception. "Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone." *Id.*

c. For that very reason, this Court overruled separate-sovereigns exceptions to other constitutional doctrines in the wake of incorporation of the relevant constitutional protections. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, the Court overruled its prior holding that federal prosecutors could use evidence unlawfully obtained by state officers. *Id.* at 213. That doctrine's "foundation," the Court

reasoned, had "disappeared" when the Court incorporated the Fourth Amendment against the States. *Id.* Likewise, in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court overruled its prior holding that one sovereign could, in convicting a defendant, rely on testimony unlawfully compelled by another. *Id.* at 57. The incorporation of the Fifth Amendment's privilege against self-incrimination, the Court reasoned, "necessitate[d] a reconsideration" of that doctrine. *Id.*

d. The separate-sovereigns exception to the Double Jeopardy Clause should meet the same fate for the same reason—*i.e.*, the Court should overrule the exception because incorporation eroded its doctrinal underpinnings. *See Grimes*, 641 F.2d at 101 ("[A]n important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitutional developments."). The double-jeopardy separate-sovereigns exception has become "the kind of doctrinal dinosaur or legal last-man-standing" for which a departure from *stare decisis* is more than justified. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015).

2. Just as doctrinal erosion can support a departure from *stare decisis*, so too can factual shifts. Specifically, a precedent should give way when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855; *see also, e.g. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, (1932) (Brandeis, J., dissenting) ("[T]his court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with

facts newly ascertained[.]"). The dramatic expansion of federal criminal law in the years since the separate-sovereigns exception is exactly the kind of seismic shift that calls for reevaluation of doctrines, like the separate-sovereigns exception, premised on the old regime.

a. Again, consider the foundational decision in *Fox*, 46 U.S. 410. There, in indicating that successive prosecutions by separate sovereigns would be permissible, the Court attested to its belief that such prosecutions would occur only in the most exceptional circumstances:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

Id. at 435.

At the time, that expectation—that duplicative state and federal convictions would be exceedingly rare—was entirely reasonable. For centuries, federal and state criminal justice systems operated with next to no overlap, with state criminal law covering most of the ground and federal criminal law limited to narrowly defined federal interests. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138–40 (1995). And, as a result, there was "little, if

any, official coordination" between state and federal prosecutors. Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 205 (2011).

b. It would be an understatement to say that the game has changed. Federal criminal law has ballooned to the extent that "the federal government has [now] duplicated virtually every major state crime." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997); *see* Brickey, *supra*, 1140–45 (describing the expansion of federal criminal law over time). As a result and of necessity, "[t]he degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995); *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 31-32 (2011).

c. These dramatic changes have eliminated a factual predicate of the separate-sovereigns exception—*i.e.*, that instances of duplicative prosecutions would be few and far between and, relatedly, that opportunities for state-federal collusion to a defendant's detriment would be limited. "The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions." Meese, *supra*, 3. Increasing state-federal cooperation, too, renders the separate-sovereigns exception far more problematic than the Court could have anticipated. *See* Amar, *supra*, 48 ("[I]n a world where federal and state governments generally are presumed to, and do

indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed.").

Gamble's is, again, a case in point. Whereas *Fox* anticipated that duplicative prosecutions would occur only in "instances of peculiar enormity, or where the public safety demanded extraordinary rigor," 46 U.S. at 435, Gamble faced duplicative prosecutions for a mine-run offense. According to the United States Sentencing Commission, convictions involving "illegal possession of a firearm, usually by a convicted felon" accounted for more than half of the 7,305 federal firearms convictions in fiscal year 2016. United States Sentencing Commission, *Overview of Federal Criminal Cases—Fiscal Year 2016* 8–9. The *Fox* Court did not anticipate—and, given the facts on the ground, could not reasonably have anticipated—that such common offenses would admit of duplicative federal and state prosecutions. To the contrary, it took as its premise a state of affairs that no longer exists. The separate-sovereigns exception has thus outlived the world that birthed it. A "fresh examination" is more than warranted. *Sanchez-Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring).

II. THIS CASE IS AN IDEAL VEHICLE.

1. This case is as clean a vehicle as the Court will ever get for taking up this question. Gamble raised only one defense to his federal conviction—that it violated the Double Jeopardy Clause. When the District Court denied Gamble's motion to dismiss his indictment on that ground, Gamble expressly preserved his right to raise this issue on appeal. He

then duly raised it on appeal before the Eleventh Circuit. Both decisions below hinged exclusively on the validity of this Court's separate-sovereigns exception. Neither the District Court nor the Court of Appeals even hinted that any procedural bar or other substantive issue impacted (or could have impacted) their decisions, or that there is any basis for maintaining Gamble's federal conviction if this Court overrules the separate-sovereigns exception. If ever there were a clean vehicle for revisiting the separate-sovereigns exception, this is it.

2. It is not every day that this Court is presented with a clean vehicle on this issue. Gamble's counsel is aware of just two petitions purporting to present this question since Justices Thomas and Ginsburg called for reconsideration of the issue. The first was denied after respondent raised a number of vehicle problems. *See Walker*, 137 S. Ct. 1813 (denying certiorari). The second remains pending before this Court. *See Tyler v. United States*, No. 17-5410. While *Tyler* may be a suitable vehicle, it arises in an interlocutory posture and has a complex procedural history. *See United States v. Tyler*, 220 F. Supp. 3d 563, 570–71 (M.D. Pa. 2016).[3]

Here, Gamble preserved the question presented at every turn, and that question is undeniably outcome determinative. He has no other defense; proceedings are otherwise complete; and neither court below

[3] If the Court grants certiorari in *Tyler* (or any other case presenting this question), it should hold this case. If the Court proceeds to reject the separate-sovereigns exception, it should grant this petition, vacate the decision below, and remand for further proceedings.

suggested any alternative ground, procedural or substantive, for denying his motion to dismiss. In short, Terance Gamble is sitting in prison because of the separate-sovereigns exception; overruling that exception would set him free. This is the "appropriate case" Justices Ginsburg and Thomas envisioned. *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring). The Court should not pass it up.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 24, 2017

APPENDIX

APPENDIX A

694 Fed.Appx. 750 (Mem)
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Terance Martez GAMBLE, Defendant-Appellant.

No. 16-16760
|
Non-Argument Calendar
|
(July 28, 2017)

Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:16-cr-00090-KD-B-1

Attorneys and Law Firms

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Before HULL, WILSON, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Terance Martez Gamble appeals his conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Gamble argues that the district court erred by determining that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama.

We review *de novo*, as a pure question of law, any possible violation of the Double Jeopardy Clause. *United States v. McIntosh*, 580 F.3d 1222, 1226 (11th Cir. 2009).

The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns. *Abbate v. United States*, 359 U.S. 187, 195, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). We have followed the precedent set by *Abbate* in *Hayes*, stating that unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine. *United States v. Hayes*, 589 F.2d 811, 817-18 (5th Cir. 1979). We have, more recently, stated that "[t]he Double Jeopardy Clause does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct."

United States v. Bidwell, 393 F.3d 1206, 1209 (11th Cir. 2004).

In *Sanchez-Valle*, the Supreme Court stated that the states were separate sovereigns from the federal government because the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. *Puerto Rico v. Sanchez Valle*, 579 U.S. – ——, ——, 136 S.Ct. 1863, 1871, 195 L.Ed.2d 179 (2016). It explained that prior to forming the Union, the States possessed separate and independent sources of power and authority, which they continue to draw upon in enacting and enforcing criminal laws. *Id.* State prosecutions therefore have their most ancient roots in an "inherent sovereignty" unconnected to, and indeed pre-existing, the U.S. Congress. *Id.* The Supreme Court differentiated Puerto Rico from the States, stating that it was not a sovereign distinct from the United States because it had derived its authority from the U.S. Congress. *Id.* at 1873-74. It concluded that the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws. *Id.* at 1876.

The district court did not err by determining that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama, because based on Supreme Court precedent, dual sovereignty allows a state government and the federal government to prosecute an individual for the same crime, when the States rely on authority originally belonging to them

before admission to the Union and preserved to them by the Tenth Amendment. Accordingly, we affirm.

AFFIRMED.

All Citations

694 Fed.Appx. 750 (Mem)

APPENDIX B

United States District Court,
S.D. Alabama, Southern Division.

United States of America,
v.
Terance Gamble, Defendant.

Criminal Action No. 16-00090-KD-B
|
Signed 06/20/2016
|
Filed 06/21/2016

ORDER

KRISTI K. DuBOSE, UNITED STATES DISTRICT JUDGE

This action is before the Court on Defendant Terance Gamble's motion to dismiss the Indictment and memorandum in support (docs. 18, 19).[1] Upon consideration and for the reasons set forth herein, the motion to dismiss is denied.

On May 27, 2016, Gamble was convicted in the Mobile County, Alabama Circuit Court, Criminal Action No. 2016-2740, as a prohibited person in

[1] Defendant's motion for leave to file the motion to dismiss beyond the time set in the Pretrial Order (doc. 17) is GRANTED.

possession of a firearm in violation of Ala. Code § 13A-11-72. Now, in consideration of the same incident of November 29, 2015 that gave rise to his state court conviction, he has been indicted in the district court for violation of 18 U.S.C. § 922(g)(1) as a prohibited person in possession of a firearm.

Gamble argues that the dual prosecution by this Court and the State of Alabama subjects him to Double Jeopardy. He relies upon the recent decision in *Commonwealth of Puerto Rico v. Sanchez-Valle*, ___ S. Ct. ____, 2016 WL 3189527 (June 9, 2016), wherein the Supreme Court held that the Double Jeopardy Clause barred the United States and Puerto Rico from separately prosecuting Sanchez-Valle for the same conduct under equivalent criminal laws because the Commonwealth of Puerto Rico and the United States were not separate sovereigns. More specifically, Gamble relies upon the concurrence of Justice Ginsberg, joined by Justice Thomas, for the premise that dual sovereign prosecutions "warrant attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA." *Id.* at *11. Gamble asserts that "the sovereignty of the United States derives from the people", and "[t]hose same people, at least a sub-group of them, to wit the people of Alabama, confer authority on their state." Thus, he argues "the people cannot prosecute two times for the same offense" (doc. 19, p. 3).

The following is binding precedent that dictates the Court's decision. In *United States v. Hayes*, 589 F. 2d 811 (5th Cir. 1979), the Fifth Circuit held as follows:

> Appellant's first group of arguments concern the validity of the federal prosecution in light of the

previous state prosecution. First, appellant urges this court to abandon the well-established rule that there is no constitutional bar to successive state and federal prosecutions for the same criminal conduct. The leading cases in this area are *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959) and *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). In *Abbate*, the defendant had first been tried and convicted in an Illinois court for conspiring to damage another's property and had been sentenced to three months imprisonment. He was subsequently prosecuted by the federal government for conspiring to destroy communications facilities operated or controlled by the United States, 18 U.S.C. s 1362 (1964). *Bartkus* involved a defendant who was convicted of armed robbery under Illinois law, after having been acquitted by a federal jury of robbing a federally insured savings and loan association, 18 U.S.C. § 2113 (1964). The Court reasoned that to outlaw successive prosecution would enable one sovereign to interfere with the administration of the other's criminal law. The classic formulation of this "dual sovereignty" concept states:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory.... Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

United States v. Lanza, 260 U.S. 377, 382, 43 S.Ct. 141, 142, 67 L.Ed. 314 (1922).

While the Court has consistently expressed concern over the possible abuses of dual prosecutions, *See Bartkus v. Illinois*, 359 U.S. 121, 138, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) ("the greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy"); *United States v. Lanza*, 260 U.S. 377, 383, 43 S.Ct. 141, 67 L.Ed. 314 (1922) ("in the benignant spirit" in which the federal system is administered, defendants should be subject to dual state-federal prosecutions only "in instances of peculiar enormity"). Quoting *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434, 12 L.Ed. 213 (1847), and while the *Lanza-Abbate-Bartkus* doctrine has met harsh criticism, *See, e.g.*, Harrison, Federalism and Double Jeopardy; A Study in the Frustration of Human Rights, 17 U. Miami L.Rev. 306 (1963); Fisher, Two Sovereignties and the Intruding Constitution, 28 U.Chi.L.Rev. 591, 599 (1961); Grant, The Lanza Rule of Successive Prosecutions, 32 Colum.L.Rev. 1309, 1329 (1932), the doctrine has nonetheless been applied consistently by the Circuit Courts. *See, e.g., United States v. Harris*, 551 F.2d 621 (5th Cir.), Cert. denied, 434 U.S. 836, 98 S.Ct. 125, 54 L.Ed.2d 98 (1977); *United States v. Cordova*, 537 F.2d 1073, 1075 (9th Cir.), Cert. denied, 429 U.S. 960, 97 S.Ct. 385, 50 L.Ed.2d 327 (1976); *United States v. Villano*, 529 F.2d 1046, 1061 (10th Cir.), Cert. denied, 426 U.S. 953, 96 S.Ct. 3180, 49 L.Ed.2d 1193 (1976); *United States v. Johnson*, 516 F.2d 209, 212 (8th Cir.), Cert. denied, 423 U.S. 859, 96 S.Ct. 112, 46 L.Ed.2d 85 (1975); *United States v. Barone*, 467 F.2d 247, 250 (2d Cir. 1972). Moreover, the Supreme Court has recently

reaffirmed the dual sovereignty doctrine. *See United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (Indian tribe and federal government are dual sovereigns); *Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) (dictum) (dual sovereignty principle is inherent in the federal system). Unless and until the Supreme Court overturns *Abbate*, appellant's double jeopardy claim must fail.

United States v. Hayes, 589 F.2d 811, 817-18 (5th Cir. 1979); *See also Lloyd v. Marshall*, 525 Fed.Appx. 889, 892 (11th Cir. 2013) ("Lloyd's argument that his prosecution in the federal and state courts violated the Double Jeopardy Clause lacks merit[.]") (citing *Abbate v. United States*, 359 U.S. 187, 189–96, 79 S.Ct. 666, 668–71, 3 L.Ed.2d 729 (1959)); *United States v. Morgan*, 337 Fed.Appx. 798, 800 (11th Cir. 2009) ("Morgan argues that the instant prosecution violated his right against double jeopardy because he was previously convicted in Fulton County, Georgia of the same felon-in-possession offense. The argument fails, however, because, as he properly concedes, the Supreme Court has rejected it.") (citing *Abbate v. United States*, 359 U.S. 187, 189–96, 79 S.Ct. 666, 668–71, 3 L.Ed.2d 729 (1959)); *United States v. Harden*, 37 F.3d 595, 598 (11th Cir. 1994) ("[T]he United States Attorney has prosecutorial discretion even if a case is first referred for state prosecution because a defendant may be prosecuted and convicted under a federal statute following conviction in state court for the same conduct without violating due process.") (citing *Abbate v. United States*, 359 U.S. 187, 190–96, 79 S.Ct. 666, 668–71, 3 L.Ed.2d 729 (1959))); *United States v. Brown*, 186 Fed.Appx. 914, 918 (11th

Cir. 2006) ("Furthermore, '[t]he Double Jeopardy Clause does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct.' ") (quoting *United States v. Bidwell*, 393 F.3d 1206, 1209 (11th Cir. 2004)).

Accordingly, unless and until the Supreme Court overturns *Abbate*, Gamble's Double Jeopardy claim must likewise fail.

DONE and **ORDERED** this 20th day of June 2016.

All Citations

Not Reported in F.Supp.3d, 2016 WL 3460414

No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should reinterpret the Double Jeopardy Clause and overturn the long-held understanding that successive prosecutions by separate sovereign governments are not prosecutions for the "same offence." U.S. Const. Amend. V.

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In the Supreme Court of the United States

No. 17-646

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 694 Fed. Appx. 750. The order of the district court (Pet. App. 5a-10a) is not published in the Federal Supplement but is available at 2016 WL 3460414.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. The petition for a writ of certiorari was filed on October 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Alabama, petitioner was convicted of possession of a firearm by a felon, in

violation of 18 U.S.C. 922(g). Judgment 1. He was sentenced to 46 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3.

1. On September 4, 2008, petitioner was convicted in Alabama state court of second-degree robbery. C.A. App. 12, 37. Approximately seven years later, an officer with the Mobile Police Department conducted a traffic stop of petitioner's car after noticing that one of the headlights was out. *Id.* at 49. The officer smelled marijuana coming from inside the vehicle, ordered petitioner out of the car, and conducted a search of the driver's area in the car. *Ibid.* The officer found a loaded handgun, a digital scale, and marijuana. *Ibid.*

On April 28, 2016, a federal grand jury in the Southern District of Alabama returned a one-count indictment charging petitioner with possessing a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Nearly one month later, on May 27, 2016, petitioner was convicted in Alabama state court of being a prohibited person in possession of a firearm, in violation of Ala. Code Ann. § 13A-11-72 (LexisNexis 2005). Pet. App. 5a-6a. The April 2016 federal indictment was based on "the same incident * * * that gave rise to [petitioner's] state court conviction." *Id.* at 6a.

Petitioner moved to dismiss his federal indictment on double jeopardy grounds. The district court denied the motion, concluding that petitioner's argument was foreclosed by binding precedent in this Court and the Eleventh Circuit holding that the federal government is a separate sovereign from an individual state and that the Double Jeopardy Clause does not prohibit separate prosecutions by separate sovereigns. See Pet. App. 5a-10a (citing, *inter alia*, *Abbate* v. *United States*, 359 U.S. 187 (1959), and *United States* v. *Hayes*, 589 F.2d 811

(5th Cir.), cert. denied, 444 U.S. 847 (1979)). The district court stated that, "unless and until the Supreme Court overturns *Abbate*, [petitioner's] Double Jeopardy claim must likewise fail." *Id.* at 10a.

Petitioner subsequently pleaded guilty pursuant to a plea agreement, though he reserved his right to appeal the denial of his motion to dismiss on Double Jeopardy grounds. Plea Agreement 1, 7. On October 18, 2016, the district court sentenced petitioner to 46 months of imprisonment, to run concurrently with his Alabama state sentences for being a prohibited person in possession of a firearm, as well as for discharging a gun into an occupied vehicle and possession of marijuana in the first degree. Judgment 2.

3. In an unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1a-4a. The court explained that this Court had held in *Abbate* "that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns." *Id.* at 2a. The court of appeals further stated that "unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine." *Ibid.* (citing *Hayes*, 589 F.2d at 817-818). And the court observed that this Court's recent decision in *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863 (2016), reaffirmed the separate-sovereign doctrine. Pet. App. 3a.

ARGUMENT

Petitioner contends (Pet. 5-19) that, although his double jeopardy claim is foreclosed by controlling precedent from this Court, see, *e.g.*, *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016), the Court should grant certiorari to reconsider the Double Jeopardy Clause's

dual-sovereignty doctrine. That contention lacks merit. This Court has applied that doctrine numerous times over the span of more than 150 years, and has already considered and rejected many of petitioner's arguments for reconsidering it. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); *Bartkus* v. *Illinois*, 359 U.S. 121, 138 (1959). This Court has also repeatedly denied other petitions seeking to reconsider the doctrine, including most recently in *Walker* v. *Texas*, 137 S. Ct. 1813 (2017) (No. 16-636).[1] The Court should do the same here.

1. The court of appeals correctly rejected petitioner's claim that, because he was previously convicted on state charges in Alabama, the Double Jeopardy Clause bars his federal conviction for possessing a firearm while being a convicted felon.

a. The Double Jeopardy Clause provides that no person shall "be subject for the *same offence* to be twice put in jeopardy of life or limb." U.S. Const. Amend. V (emphasis added). As this Court recently reaffirmed in *Sanchez Valle*, 136 S. Ct. at 1867, the Double Jeopardy Clause does not prohibit successive prosecutions by separate sovereigns for offenses that consist of the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence," within the meaning of the Double Jeopardy Clause. See *United States* v. *Wheeler*, 435 U.S. 313, 316-318 (1978); see also *Sanchez Valle*, 136 S. Ct. at 1870 (explaining that the Double Jeopardy Clause "drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns'") (quoting *Heath*, 474 U.S.

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[1] At least two petitions raising the same question are pending before this Court. See *Tyler* v. *United States*, No. 17-5410 (filed July 27, 2017); *Ochoa* v. *United States*, No. 17-5503 (filed July 31, 2017).

at 88) (brackets in original). The Double Jeopardy Clause thus does not forbid successive prosecutions by a State and the federal government because a State and the federal government are "two sovereignties, deriving power from different sources." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

Petitioner recognizes (Pet. 17-19) that this "dual sovereignty" doctrine forecloses his double jeopardy claim in this case. Petitioner contends (Pet. 6-17), however, that this Court should reexamine the line of cases explaining and applying that doctrine on the theory that it is inconsistent with the text and history of the Double Jeopardy Clause. This Court has repeatedly denied other petitions raising that contention. *E.g.*, *Walker*, *supra* (No. 16-636); *Roach* v. *Missouri*, 134 S. Ct. 118 (2013) (No. 12-1394); *Donchak* v. *United States*, 568 U.S. 889 (2012) (No. 12-197); *Mardis* v. *United States*, 562 U.S. 943 (2010) (No. 10-6013); *Angleton* v. *United States*, 538 U.S. 946 (2003) (No. 02-1233); *Sewell* v. *United States*, 534 U.S. 968 (2001) (No. 01-6131); see also *Koon* v. *United States*, 515 U.S. 1190 (1995) (No. 94-1664) (granting certiorari on a sentencing question, but denying review of a challenge to the dual-sovereignty doctrine). It should do the same here.

The dual-sovereignty principle has been "long held," *Sanchez Valle*, 136 S. Ct. at 1870, and "consistently * * * endorsed" by this Court, *Heath*, 474 U.S. at 93, which has recognized its soundness as a matter of "[p]recedent, experience, and reason alike," *Bartkus*, 359 U.S. at 138. The Court explained the roots of the principle more than 150 years ago. See *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852) ("The same act may be an offence or transgression of the laws of both" state and federal governments; "[t]hat either or both may (if

they see fit) punish such an offender, cannot be doubted."). And in 1959, the Court described a challenge to the dual-sovereignty doctrine as "not a new question," having been "invoked and rejected in over twenty cases." *Bartkus*, 359 U.S. at 128-129. The Court stated that to disregard a "long, unbroken, unquestioned course of impressive adjudication" was not only unwarranted, but "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Id.* at 136-137.

This doctrine follows from "the basic structure of our federal system." *Wheeler*, 435 U.S. at 320. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see *Heath*, 474 U.S. at 92 ("It is axiomatic that '[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States.'") (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819)) (brackets in original). Consistent with the constitutional design, the Double Jeopardy Clause does not prohibit prosecutions by both a State and the federal government for the same conduct: "[w]hen a defendant in a single act" breaks the laws of two sovereigns, "he has committed two distinct 'offences'" and can be prosecuted for both. *Heath*, 474 U.S. at 88. Each sovereign is entitled to "exercis[e] its own sovereignty" to "determin[e] what shall be an offense against its peace and dignity" and prosecute the offender "without interference by the other." *Lanza*, 260 U.S. at 382.

Under petitioner's interpretation of the Double Jeopardy Clause, one sovereign's efforts (successful or not) to enforce its own laws would vitiate the other sovereign's similar law-enforcement prerogatives. But that cannot be squared with the Constitution's bedrock structure of governance. As this Court has recognized, "undesirable consequences would follow" if prosecution by any one State could bar prosecution by the federal government. *Abbate* v. *United States*, 359 U.S. 187, 195 (1959). "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts," the Court has explained, "federal law enforcement must necessarily be hindered." *Ibid.* Similarly, if a federal prosecution could bar prosecution by a State, the result would be a significant interference with the States' historical police powers. See *Heath*, 474 U.S. at 93 ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.").

The dual-sovereignty doctrine thus "finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." *Heath*, 474 U.S. at 92; see, *e.g.*, *Wheeler*, 435 U.S. at 320, 330 (it rests "on the basic structure of our federal system" and the "very words of the Double Jeopardy Clause"); *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977) (per curiam) ("[I]n our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both."). As Justice Holmes stated nearly a century ago, the dual sovereignty doctrine is "too plain to need more than statement." *Westfall* v. *United States*, 274 U.S. 256, 258 (1927).

b. Petitioner contends (Pet. 6-10) that these cases were all wrongly decided because, he asserts, they conflict with the plain text and original meaning of the Double Jeopardy Clause. In so claiming, petitioner largely relies (Pet. 7-8) on English law. But this Court has already considered and rejected that line of argument. In *Bartkus*, this Court described as "dubious" such authorities and stated that they were not "relevant to discussion of our problem." 359 U.S. at 128 n.9. Given our unique constitutional scheme, a doctrine rooted in the powers and obligations of separate State and federal sovereigns will necessarily reflect the "American experience, including our structure of federalism which had no counterpart in England." *United States* v. *Gillock*, 445 U.S. 360, 369 (1980). "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory." *Lanza*, 260 U.S. at 382. As even critics of the dual sovereignty doctrine have recognized, that was not true in England. See, *e.g.*, Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 316 (1963) ("In that country two sovereigns do not have *territorial* jurisdiction over a crime.").

The Court articulated the dual-sovereignty rationale the first time it encountered a situation in which the same conduct could violate different laws from two separate sovereigns. See *Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("offences falling within the competency of different authorities to restrain or punish them" are properly "subjected to the consequences which those authorities might ordain and affix to their perpetration"); see also *Moore*, 55 U.S. (14 How.) at 20 (validity of successive state and federal prosecution "cannot be

doubted"); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 569 (1850) (accepting that "the same act might * * * constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either"). And in the century from *Moore* in 1852 to *Bartkus* in 1959, the Court reaffirmed the dual-sovereignty principle 20 times. *Bartkus*, 359 U.S. at 132 & nn.19-20 (collecting cases).

This Court has also considered and rejected petitioners' suggestion (Pet. 7-8) that an early decision from this Court, *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820), is inconsistent with the dual sovereignty doctrine. In *Houston*, the Court upheld a state statute that purported to grant state military courts authority to impose federal sanctions on militiamen who failed to report for federal duty. Justice Washington suggested that if jurisdiction were proper in both state and federal military courts, then final adjudication in one would bar prosecution in the other. *Id.* at 31. But in *Bartkus*, this Court explained that those statements were based on the view that "the state statute [at issue] imposed state sanctions *for violation of a federal criminal law*." 359 U.S. at 130 (emphasis added). Accordingly, this Court concluded in *Bartkus*, *Houston* "can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Ibid.*

c. Petitioner contends (Pet. 10-14) that this Court's subsequent decision to apply the Double Jeopardy Clause to the States has undermined *Lanza* and *Abbate*. See *Benton* v. *Maryland*, 395 U.S. 784 (1969). But the

Court has specifically reaffirmed the dual-sovereignty doctrine after *Benton*, concluding in *Heath* that the doctrine's rationale has "weighty support," both in the Double Jeopardy Clause's use of the word "offence" and in the "historical understanding and political realities of the States' role in [our] federal system" of government. 474 U.S. at 92. And since *Heath*, the Court has repeatedly recognized the doctrine's continuing validity. *E.g.*, *Sanchez Valle*, 136 S. Ct. at 1870; *United States* v. *Lara*, 541 U.S. 193, 197 (2004); *Koon* v. *United States*, 518 U.S. 81, 112 (1996); *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 782 n.22 (1994); *Wheeler*, 435 U.S. at 330; *Rinaldi*, 434 U.S. at 28.

Petitioner also fails to present any logical reason why *Benton*'s incorporation of the Double Jeopardy Clause as applicable to the States should affect the dual-sovereignty doctrine. A defendant who claims a right to avoid prosecution by the federal government based on previous prosecution by a State is in the same position irrespective of whether the State itself is subject to the Double Jeopardy Clause. In each case, the defendant is arguing that the Clause prohibits a second trial by the federal government following a state trial. That claim does not in any way depend on whether the State could itself prosecute him a second time for the "same offence." U.S. Const. Amend. V.

Petitioner also contends (Pet. 14-17) that the "dramatic expansion of federal criminal law" is a "seismic shift that calls for reevaluation of * * * the separate-sovereigns exception." But the very point of the dual-sovereignty doctrine is to allow each sovereign to enforce its laws within their respective constitutional spheres, without undue interference from the other. An increase in federal criminal enforcement would mean

that now more opportunities exist for the federal government's actions to impair the "historic right" and obligation of each State to define offenses and punish offenders within their jurisdictions. *Bartkus*, 359 U.S. at 137. If the federal government could prevent a State from vindicating its criminal laws, the Founders' desire to guard against a "centralized government" and the attendant "exercise of arbitrary power" would be frustrated, not safeguarded. *Ibid.*; see *Abbate*, 359 U.S. at 195 (petitioners' rule would "marked[ly]" alter the distribution of crime-fighting authority, as the States "have the principal responsibility for defining and prosecuting crimes").

In any event, it is not clear whether a significant increase in the rate of federal prosecution has actually occurred in areas of overlap with state authority. See Wayne R. LaFave et al., *Criminal Procedure* § 1.2(f), at 106 (4th ed. 2015); Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1 (2012). Under the so-called "Petite Policy," see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam), the Department of Justice will generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was "demonstrably unvindicated" by the prior state prosecution. Offices of the U.S. Att'ys, Dep't of Justice, *United States Attorneys' Manual* § 9-2.031 (2009); see *ibid.* (describing procedures and policies by which a designated Department of Justice official must determine whether a federal case may be brought after a state prosecution). As this Court has recognized, this policy serves to protect "the citizen from any unfairness that is associated with successive prosecutions based on the same conduct" by "limit[ing] the exercise of the

power to bring successive prosecutions * * * to situations comporting with the rationale for the existence of that power." *Rinaldi*, 434 U.S. at 27-29. And in exercising their discretion, sentencing courts can take into account the results of any proceedings before another sovereign. Cf. *Koon*, 518 U.S. at 112 (federal judge may take into account prior acquittal on state charges in assessing whether a downward departure from the United States Sentencing Guidelines). For example, the district court here decided to have petitioner's federal sentence for possessing a firearm as a felon run concurrently with his state sentence for being a prohibited person in possession of a firearm (and concurrently to his state sentences for other offenses). See Judgment 2.

Petitioner contends (Pet. 16-17) that increased cooperation among federal and state prosecutors provides reason to overrule the dual sovereignty doctrine. But federal-state cooperation has long been a "conventional practice between the two sets of prosecutors throughout the country" and has long been a backdrop to the Court's interpretation of the Double Jeopardy Clause. *Bartkus*, 359 U.S. at 123. The Court has also rejected the contention that application of the dual-sovereignty doctrine turns on any showing that the United States or a State have a unique interest in a prosecution. See *Heath*, 474 U.S. at 90-92. Because the Founders "split the atom" of sovereignty, *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring), the only question is whether the prosecuting authorities derive their powers from independent sources of authority. *Heath*, 474 U.S. at 90. If they do, the "circumstances of the case are irrelevant," for one sovereign's "interest in vindicating its sovereign authority through enforcement of its laws by

definition can never be satisfied by another [sovereign's] enforcement of *its* own laws." *Id.* at 92-93. And even when they are cooperating, the federal government and the States also may have different interests in the same conduct. *E.g.*, *Abbate*, 359 U.S. at 195 (conspiracy to dynamite telephone company facilities entails both destruction of property and disruption of a federal communications network); *Bartkus*, 359 U.S. at 121-122, 137 & n.25 (robbery of a federally insured bank).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018

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* The Solicitor General is recused in this case.

No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

The "separate sovereigns"-shaped hole in the protections afforded by the Double Jeopardy Clause ought to be sealed shut. The government's argument to the contrary rests on the faulty premises that constitutional protections must give way to erroneous judicial precedent and that nothing has changed legally or factually in the century-and-a-half since the exception's creation *ex nihilo* to justify reassessing it now. The government largely ignores Mr. Gamble's arguments regarding constitutional text, purpose, and history, and the erosion of the exception's legal and factual underpinnings. And it does not deny that this case is the ideal vehicle for taking up the call, already issued by two members of this Court, to revisit the viability of this dubious doctrine. The Court should grant certiorari and put an end to the separate-sovereigns exception once and for all.

ARGUMENT

I. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED.

A. The Separate-Sovereigns Exception Is Inconsistent with the Plain Text, Original Meaning, and Purpose of the Constitution.

1. The Government does not even attempt to ground its position in the actual text of the Double Jeopardy Clause: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." It offers no response to petitioner's observation that the Clause provides for no exception

based on the identity of the prosecuting entity but rather unambiguously protects each "person" from double prosecution. Instead, the Government relies exclusively on the separate-sovereigns exception itself to conclude that each "prosecution[] by [a] separate sovereign" constitutes a separate "offense[]." Opp'n Br. at 4.

But this reasoning is entirely circular. It is also contrary to the ordinary meaning of the term "offense" in use at the time the Clause was drafted (and today). *See* Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) (defining "offence" to mean a "[c]rime" or "act of wickedness," and defining "crime," in turn, to mean "[a]n act contrary to right; an offense; a great fault; an act of wickedness"); *see also United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."). Moreover, discarding an ordinary, acts-based definition for a technicalized, sovereigns-based one is particularly artificial here given that the Clause applied originally (*i.e.*, pre-incorporation) to *only one sovereign*.

2. The Government likewise gives short shrift to the discussion of original meaning in light of historical English precedent, dismissing that whole line of argument by quoting *Bartkus v. Illinois*, 359 U.S. 121, 128 n.9 (1959), for the proposition that such precedent is "dubious" and by observing that our system of federalism has no precise analog in the United Kingdom. But the citation to *Bartkus* is itself dubious. *Bartkus* discussed only a single case, *King*

v. Hutchinson, concluding that it was unhelpful in context because of "confused" accounts of the case in later English opinions and because the case, and others like it, "reflect[ed] a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Id.*

As relevant here, however, the authorities recounting *Hutchinson* all agree: Hutchinson's acquittal abroad for murder barred his retrial in England. *See Beak v. Thyrwhit* (1688) 87 Eng. Rep. 124, 124-25; *Burrows v. Jemino* (1726) 93 Eng. Rep. 815, 815; *Gage v. Bulkeley* (1744) 27 Eng. Rep. 824, 827. The only disagreement among them—that one of the three sources reported the original trial as having occurred in Spain, not Portugal—has nothing to do with the separate-sovereigns question. *Compare Hutchinson*, 84 Eng. Rep. at 1011 (Portugal), *Beak*, 87 Eng. Rep. at 125 (Portugal), *and Gage*, 27 Eng. Rep. at 826 (Portugal)*with Burrows*, 93 Eng. Rep. at 815 (Spain). The *Bartkus* distinction between the supposed "power of discretion" exercised by English judges and "the constitutional law of our federalism" is no less inconsequential. That the English guarantee against double jeopardy was anchored in judicial discretion while its American progeny was enshrined in a written constitution says nothing about the *substance* of the guarantee itself. Indeed, if anything, the Founders' decision to include the guarantee in our Constitution rather than to rely on the discretion of judges alone is evidence of an invigorated, not weakened, protection. *See, e.g.*, *Florida v. Meyers*, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting) ("we must not forget that a central

purpose of our written Constitution . . . was to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State Governments").

The Government's attempted distinction between the separate sovereigns of the British Empire and those in our federal republic is no more persuasive. Of course, the British system, like ours, involved separate sovereigns exercising jurisdiction over the same subject matter. The only distinction the Government draws is the territorial one—*i.e.*, the separate sovereigns at issue in the English precedents did not exercise jurisdiction over the same territory. Opp'n Br. at 8. But that is a distinction without a difference. The Government offers no explanation why or how that fact has any bearing on interpretation of the Double Jeopardy Clause.

These unconvincing attacks on the historical sources are, in the end, all the Government has to offer on this front, as it is unable to muster any historical evidence in support of its own position. And at the end of the day, the fact remains that it was a "universal maxim of the common law of England, that no man [was] to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 329 (1768). So too in the early days of our country: "There is no principle better established by the common law . . . than that an individual shall not be put in jeopardy twice for the same offence." *Fox v. Ohio*, 46 U.S. 410, 439 (1847) (McLean, J., dissenting).

3. While the Government spends time discussing the purpose of the separate-sovereigns exception, it is

completely silent on the purpose of the Double Jeopardy Clause itself. The Government does not—and cannot—dispute that the Clause reflects a "constitutional policy of finality *for the defendant's benefit.*" *United States v. Jorn*, 400 U.S. 470, 479 (1971) (emphasis added); *Green v. United States*, 355 U.S. 184, 187-88 (1957) (Clause's purpose is to prevent "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"). The separate-sovereigns exception cannot be reconciled with that motivating purpose.

4. Largely as a result of its failure to grapple with the text, history, and purpose of the Double Jeopardy Clause, the Government's federalism-based argument misses the mark as well. The argument boils down to the propositions that interpreting the Double Jeopardy Clause as written (*i.e.*, to bar multiple convictions for the same crime, including when those convictions are rendered at the hands of different sovereigns) results in an impermissible restraint on the police powers of the State and federal governments and that it somehow upsets the balance of power between these two sovereigns.

The former contention is baseless. Applying the Clause to bar prosecution by the federal government after conviction (or acquittal) in State court, or vice versa, would not, as the Government contends, leave the criminal law of the second sovereign unvindicated or render its justice system subordinate. As an initial matter, a sovereign's criminal law is not left unvindicated simply because a separate sovereign

has already vindicated it. *See Moore v. Illinois*, 55 U.S. 13, 22 (1852) (McLean, J., dissenting) ("[T]he criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the Federal Government . . . may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offences under its own laws within its jurisdiction."); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (it is "fiction" to maintain "that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other"). More importantly, this argument misunderstands the purpose of the protections afforded to individuals by the Bill of Rights, particularly those protections which have been incorporated vis-à-vis the States. The purpose of the Double Jeopardy Clause, like the purpose of the Free Speech Clause or Free Exercise Clause, is not to protect the State and federal governments from each other but, rather, to secure the rights of the individual by circumscribing the powers of both. It is thus of no use to argue, as does the Government, that the plain-meaning interpretation of the Double Jeopardy Clause would in some manner cabin the authority of the government (whether State or federal): That is, after all, precisely what rights-guaranteeing clauses are intended to do. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) ("application, through the Fourteenth Amendment, of

the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess"). The Double Jeopardy Clause, then, only "vitiate[s]" or "hinder[s]," Opp'n Br. at. 7, the power of the State and federal governments in the same way, *e.g.*, that the First Amendment "vitiate[s]" government's ability to criminalize protected speech or the Fifth Amendment "hinder[s]," *id.*, the State and federal criminal justice systems by barring the government from compelling any person to testify against him- or herself.

The Government's other, related line of reasoning—that undiluted application of the Double Jeopardy Clause will upset the balance of power between the State and federal governments—fares no better, given that *both* would be barred from re-prosecuting a defendant where the other has already pursued the case to conviction or acquittal. The Government argues, or at least intimates, that the "historical police powers" of the States will be disproportionately affected. Opp'n Br. at 7. But to the extent the States' police powers have been improperly curtailed, the fault lies not with the plain language of the Double Jeopardy Clause but rather with the improper federalization of criminal law. *Cf. United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("States possess primary authority for defining and enforcing the criminal law." (citation omitted)).

Contrary to the Government's assertion, then, it is the separate-sovereigns exception itself that runs afoul of federalist principles, making a mockery of the assertion that our federal system preserves and enhances freedom, *Bond v. United States*, 564 U.S.

211, 220–21 (2011). The separate-sovereigns exception does precisely the opposite, permitting the two components of our federal system to conspire together to deprive an individual of liberty where a single government would be powerless to do so. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) (exception permits different governments "to do together what . . . neither can do separately").

B. The Separate-Sovereigns Exception's Doctrinal and Factual Underpinnings Have Eroded.

1. As set forth in Mr. Gamble's opening brief, "*stare decisis* cannot possibly be controlling when . . . the decision in question has . . . [had] its underpinnings eroded . . . by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). And as also set forth there, justification for the separate-sovereigns exception has, since its creation, rested largely on the fact that the Double Jeopardy Clause applied only to the federal government. Indeed, all of the precedents developing and reaffirming the exception pre-date the 1969 incorporation of the Double Jeopardy Clause in *Benton v. Maryland*, 395 U.S. 784 (1969). The government asserts the exception has been reaffirmed since then, Opp'n Br. at 9-10, but while this Court has applied and explained the traditional justifications for the exception, it has never squarely reconsidered the validity of the exception after, and in light of, incorporation.

The Government's attempt to downplay the significance of this fact is to no avail. Besides

pointing to this Court's post-1969 invocation of the exception (again, without considering the effects of incorporation on its continuing validity), it raises only a single argument in opposition to reconsideration of the doctrine in light of incorporation: "A defendant who claims a right to avoid prosecution by the federal government based on previous prosecution by a State is in the same position irrespective of whether the State is subject to the Double Jeopardy Clause." Opp'n Br. at 10. But the government cites no authority in support of this position, which runs counter to this Court's jurisprudence regarding other incorporated constitutional protections. *See Elkins v. United States*, 364 U.S. 206, 213 (1960) (foundation of doctrine allowing federal prosecutors to rely on evidence illegally obtained by state officials "disappeared" upon incorporation of the Fourth Amendment); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (overruling prior holding that one sovereign could prosecute in reliance on testimony unlawfully compelled by another in light of incorporation of Fifth Amendment's protection against self-incrimination). The argument is also faulty in that it focuses exclusively on the subsequent federal prosecution. Were the Double Jeopardy Clause not applicable to the States (as was the case prior to 1969), then a State prosecution simply would not "count" for purposes of double-jeopardy analysis, regardless of whether it occurred before or after prosecution by the federal government. *See, e.g.*, *United States v. Lanza*, 260 U.S. 377, 382 (1922) ("The Fifth Amendment[']s protection against double

jeopardy] . . . applies *only to proceedings by the Federal Government*, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a *first trial* for the same offense *under the same authority*." (internal citation omitted; emphasis added)). Incorporation of the Clause changed that, turning the exception's jurisprudential underpinnings on their head.

2. The government stumbles again in its response to Mr. Gamble's argument regarding the federalization of criminal law. It does not deny that federal criminal law and prosecution have undergone a dramatic expansion in recent decades, nor does it engage with any of the numerous sources cited by Mr. Gamble in support of this observation. Instead, the government merely hedges, asserting that "it is not clear whether a significant increase in the rate of federal prosecution has actually occurred in areas of overlap with state authority." Opp'n Br. at 11. But even that seemingly modest assertion is an overreach, as the single source the Government relies upon is an outlier that has been deeply criticized. *See* Julie O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 Harv. J.L. & Pub. Pol'y 57 (2014) (critiquing Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1 (2012)).

The Government emphasizes the Department of Justice's internal policy to "generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was demonstrably unvindicated by the prior state prosecution." Opp'n Br. at 11 (quotation omitted).

But as this case epitomizes, a discretionary executive policy is no substitute for the proper enforcement of a constitutional guarantee. The government makes no attempt to identify what "Federal interest" would have gone "demonstrably unvindicated" had it opted to forego double prosecution and punishment here. Indeed, the events surrounding Mr. Gamble's crime—a broken taillight, two baggies of marijuana, and possession of a handgun—are remarkable only for their banality. If double prosecution is appropriate here, it is difficult to imagine when it would not be.

II. THIS CASE IS AN IDEAL VEHICLE.

The Government does not deny that, should the Court decide to take up the separate-sovereigns question, this case presents the perfect opportunity to do so. It presents neither the vehicle problems that plagued *Walker* (and presently plague *Ochoa*) nor the complex procedural history at issue in *Tyler*. *See Walker v. Texas*, 137 S. Ct. 1813 (2017) (denying certiorari); *Ochoa v. United States*, No. 17-5503; *Tyler v. United States*, No. 17-5410. To the contrary, the procedural posture of the case is straightforward, and the constitutional question is squarely, and exclusively, presented. Mr. Gamble raised only one defense to his federal conviction—that it violated the Double Jeopardy Clause. That defense has been meticulously preserved. And he sits in prison today because of the separate-sovereigns exception. This is indeed the "appropriate case" in which to undertake a "fresh examination" of the separate-sovereigns exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring).

CONCLUSION

"Nothing can be more repugnant . . . than two punishments for the same act." *Fox*, 46 U.S. at 440 (McLean, J., dissenting). For the foregoing reasons and those stated in Mr. Gamble's opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Amici have a strong interest in ensuring that all constitutional provisions, including the Double Jeopardy Clause, are applied in a manner consistent with their text and history.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for a writ of certiorari here presents the important question whether the Fifth Amendment's Double Jeopardy Clause, which prohibits any person from being "twice put in jeopardy of life or limb" for the same offense, bars a federal prosecution for a criminal offense when the defendant has already been prosecuted for the same offense in state court. As the

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[1] Counsel for all parties received timely notice of *amici*'s intention to file this brief; all parties have consented to its filing. Further, no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission.

petition demonstrates, such successive prosecutions plainly violate the Clause, which was adopted to preserve the fundamental common-law protection against successive prosecutions for a single offense. *Amici* submit this brief to underscore that the dual-sovereignty exception to the Double Jeopardy Clause is inconsistent with the text, structure, and history of the Constitution, as well as with significant jurisprudential developments that have occurred since this Court last meaningfully considered the issue.

The text and history of the Double Jeopardy Clause establish that the Framers viewed its prohibition on successive prosecutions as a fundamental protection of individual liberty and an important safeguard against government harassment and overreach. Indeed, by the time the Bill of Rights was drafted, the protection against double jeopardy was already a well-established part of the English common law, one that the Framers thought would help provide a "barrier[] . . . against the approaches of arbitrary power." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1773.

In adopting the Double Jeopardy Clause to protect against "the approaches of arbitrary power," the Framers were acting out of a more general concern about how to protect individual liberty against government overreach, a concern that they addressed, in part, through the adoption of a federalist structure of government. As James Madison explained, the existence of both the federal government and state governments would provide "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 323 (Madison) (Clinton Rossiter ed., 1961).

The dual-sovereignty exception, by allowing two governments to do together what neither could do alone, undermines the fundamental protection of individual liberty that both the Double Jeopardy Clause and our federalist structure were supposed to provide. After all, when a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. Similarly, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of whether the successive prosecutions are brought by the same sovereign or different ones.

In addition, concerns about government overreach and harassment are particularly important today for two reasons. First, the scope of the federal criminal law is now far more expansive than it once was. *See, e.g., Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) ("the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws"). Second, there is now significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997). These two factors, taken together, make it particularly easy for the federal and state governments to engage in the repeated harassment for a single offense that the Double Jeopardy Clause was adopted to prevent.

Finally, significant developments in constitutional law that have occurred since this Court last considered the dual-sovereignty exception make this Court's review all the more important. *See generally United*

States v. Gaudin, 515 U.S. 506, 521 (1995) (reasons for stare decisis undermined when the "underpinnings" of the "decision in question" have been "eroded[] by subsequent decisions of this Court"). When this Court first adopted the dual-sovereignty doctrine that allows successive prosecutions by different sovereigns, it did so against the background of a legal regime in which the Double Jeopardy Clause did not apply to the States. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). Whatever validity the doctrine may have had in that context, it has been completely undermined by subsequent decisions by this Court recognizing that the Fourteenth Amendment protects against state infringement of the personal rights guaranteed by the Bill of Rights, including the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784 (1969). As this Court has recognized in other contexts, the "incorporation" of the Bill of Rights undermines whatever basis may once have existed for this doctrine. Indeed, the Fourteenth Amendment's protection of individual rights against state action makes clear that successive prosecutions by different sovereigns violate the Double Jeopardy Clause.

Although cases continue to raise this important issue, *see, e.g., Tyler v. United States*, No. 17-5410 (U.S. July 27, 2017), the Court has not meaningfully revisited the validity of the dual-sovereignty exception to the Double Jeopardy Clause since that Clause was incorporated. It should do so now. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.").

Amici urge the Court to grant the Petition, revisit

the dual-sovereignty doctrine as applied to the Double Jeopardy Clause, and restore the proper scope of this important protection of individual liberty.

ARGUMENT

I. THE DUAL-SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE IS AT ODDS WITH THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTION

A. Both the Double Jeopardy Clause and Our Federalist Structure Were Adopted To Protect Individual Liberty

The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As the text suggests, the Framers inserted this critical safeguard of liberty into the Constitution to ensure that no one could be subjected to the "hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *see Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct.").

The Double Jeopardy Clause has its origins in the English common law, which not only "prohibited a second punishment for the same offence, but . . . went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte Lange*, 85 U.S. 163, 169 (1873).[2] To the Framers, the Double Jeopardy Clause

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[2] The roots of the double jeopardy principle may go back even further. *See Benton*, 395 U.S. at 795 ("The fundamental nature of

was "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." 3 Story, *supra*, § 1773.

In his famous *Commentaries on the Laws of England*, Blackstone discussed the double jeopardy principle at length and described the two common-law pleas, autrefois acquit and autrefois convict, which provided the basis for the Double Jeopardy Clause. "[T]he plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once . . . [W]hen a man is once fairly found not guilty . . . before any court having competent jurisdiction, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 William Blackstone, *Commentaries on the Laws of England* *335; *cf. Benton*, 395 U.S. at 795 ("[a]s with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone"). Blackstone explained that the second of these pleas, "autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given," also "depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime." *Id.* at *336.

Drawing on Blackstone, the Framers inscribed the double jeopardy principle into the Constitution. In so doing, they made clear that the idea that a person could be twice "put in jeopardy of life or limb" for the

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the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times."); *Bartkus*, 359 U.S. at 151 (Black, J., dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.").

same offense was anathema. For example, in discussing an early version of the Clause proposed by James Madison, Representative Roger Sherman observed that "the courts of justice would never think of trying and punishing twice for the same offence." 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1790).[3] Likewise, Representative Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted," and "in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.*

Thus, to the Framers, the prohibition on double jeopardy was fundamental—and essential to protecting liberty from government overreach. *See* 3 Story, *supra*, § 1774 (the Clause provided "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy"); *cf. Bartkus*, 359 U.S. at 153-54 (Black, J., dissenting) (noting that the double jeopardy principle "has been recognized here as fundamental again and again").[4]

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[3] Madison's initial proposal provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 451-52 (1789). This proposal was amended in the Senate; in its final form, the Double Jeopardy Clause used "the more traditional language employing the familiar concept of 'jeopardy,'" "language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*." *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

[4] The Clause also provides an important structural protection of the right to trial by jury, a right Madison noted was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." 1 Annals of Cong. 454 (1789).

The Framers' adoption of the Double Jeopardy Clause to protect against "the approaches of arbitrary power," 3 Story, *supra*, § 1773, was consistent with their more general concern about how to "enhance[]" individuals' protection from government overreach, *see Bond v. United States*, 564 U.S. 211, 221 (2011) (quotation marks and citation omitted), a concern that they addressed, in part, through the adoption of a federalist structure, *see, e.g.*, *id.* at 220-21 ("The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999))); *New York v. United States*, 505 U.S. 144, 181 (1992) ("'[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))). As Madison explained, federalism provides "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, *supra*, at 323 (Madison); *see id. No. 28*, at 181 (Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress.").

As the next section discusses, the dual-sovereignty exception, by allowing two governments to do jointly what neither can do alone, undermines the fundamental protection of individual liberty that both the Double Jeopardy Clause and our federalist structure were supposed to provide.

B. The Dual-Sovereignty Exception to the Double Jeopardy Clause Undermines the Protection of Individual Liberty that that Clause and Our Federalist Structure Were Designed To Provide

As this Court has recognized:

> The underlying idea [behind the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187-88; *see* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96 (1998) (Double Jeopardy Clause "safeguards . . . the individual defendant's interest in avoiding vexation," whether he was first acquitted or convicted).

When a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. Similarly, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. As Justice Black once put it, "If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *See Bartkus*, 359 U.S. at 155 (Black, J., dissenting); *see*

also id. ("The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp.").

Indeed, the dual-sovereignty exception to the Double Jeopardy Clause turns federalism principles on their head, permitting the two levels of government that the Framers believed would enhance individual liberty to do just the opposite. This perversion of federalist principles is particularly troubling in an age of expansive federal criminal law and significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Meese III, *supra*, at 3 ("[F]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction."); Ryan, *supra*, at 31-32. After all, the dual-sovereignty doctrine makes it particularly easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense, just the type of government overreach that the Double Jeopardy Clause was adopted to prevent. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 9-10 (1995) ("given the increased level of federal-state cooperation in enforcing criminal laws, dual sovereign prosecutions also raise[] the traditional double jeopardy concern that successive prosecutions [will] give government an illegitimate dress rehearsal of its case and a cheat peek at the defense" (internal footnote omitted)); Meese III, *supra*, at 22 ("The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions.").

II. THE DUAL-SOVEREIGNTY DOCTRINE IS INCONSISTENT WITH THE INCORPORATION OF THE DOUBLE JEOPARDY CLAUSE AGAINST THE STATES

As just noted, the dual-sovereignty doctrine is inconsistent with the text, structure, and history of the Constitution. *See also* Pet. 2 (the "'separate sovereigns' exception . . . is inconsistent with the plain text and original meaning of the Constitution"); *id.* at 6-10. Moreover, whatever sense it might have made before the Double Jeopardy Clause was incorporated against the states, it plainly makes no sense now.

The origins of the dual-sovereignty doctrine long pre-date incorporation. In its 1847 decision in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), this Court cited *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which held that the Bill of Rights did not bind the States, and then suggested in dicta that the Double Jeopardy Clause would not bar successive punishments by state and federal governments because the prohibition was "exclusively [a] restriction[] upon federal power." *Fox*, 46 U.S. at 434; *see United States v. Marigold*, 50 U.S. 560, 569 (1850) (citing *Fox* for the proposition that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each"); *Moore v. Illinois*, 55 U.S. 13 (1852) (relying on *Fox* and *Marigold* to adopt the dual-sovereignty doctrine).

These decisions arguably made sense in light of *Barron*: if a state could prosecute an individual as many times as it wanted for the same offense, or could prosecute him after he had already been prosecuted by the federal government, it was not a stretch to think

that the federal government could prosecute him after he had been prosecuted by the state. *See* Amar & Marcus, *supra*, at 11 (noting that "the logic of [*Barron*] furnished an important justification for the early dual sovereignty doctrine" (internal footnote omitted)). All the Double Jeopardy Clause barred, then, was re-prosecution by the federal government. *See id.* at 4. "This logic radiated beyond double jeopardy," *id.* at 11, and the dual-sovereignty doctrine was applied in other contexts, *see, e.g.*, *Feldman v. United States*, 322 U.S. 487, 492-93 (1944) (immunized testimony compelled by federal officials could nonetheless be used in state prosecutions).

When this Court last meaningfully considered the dual-sovereignty doctrine, the Double Jeopardy Clause had not yet been incorporated—as the Court noted in concluding that the Clause posed no bar to successive prosecutions by federal and state governments. *See Bartkus*, 359 U.S. at 124 ("We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."); *Abbate*, 359 U.S. at 194 ("[t]he Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority").[5]

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[5] This Court's adherence to the dual-sovereignty doctrine may also have been motivated by the practical concern that prohibiting successive punishments "must necessarily" "hinder[]" federal law enforcement, *Abbate*, 359 U.S. at 195, practical concerns that may have been particularly salient in the late 1950s when southern States were resisting federal desegregation laws, *see United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (observing that the

In the years following *Bartkus* and *Abbate*, this Court's view of federalism underwent a radical transformation, as the Court recognized that most of the Bill of Rights, including the Double Jeopardy Clause, should apply against the states. *See Benton*, 395 U.S. at 795-96 (double jeopardy); *see also, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth and Fifth Amendments); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (self-incrimination); *cf.* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Senator Jacob Howard, in introducing the Fourteenth Amendment, explained that its broad text protected against state infringement all of the "personal rights guaranteed and secured by the first eight amendments").

In the years following *Bartkus* and *Abbate*, this Court also began to recognize that incorporating the Bill of Rights' protections against the States had important implications for the viability of the dual-sovereignty doctrine—which had rested heavily on *Barron* and its conclusion that the Bill of Rights' protections

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Court's embrace of the dual-sovereignty doctrine may have been motivated by "[t]he danger that one sovereign [would] negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence" and explaining that "this justification may explain the doctrine's emergence during prohibition when there was considerable fear of state attempts to nullify federal liquor laws, as well as the doctrine's rebirth just at the time when state attempts to nullify federal desegregation laws and orders were at their height" (internal footnotes omitted)). But these practical concerns cannot justify the continued application of a doctrine that is so clearly inconsistent with the Constitution's text and history. *See id.* at 498 ("[I]t is hard to justify limiting the reach of the Bill of Rights, adopted as it was to protect individual rights and liberties against governmental encroachment, on no stronger grounds than the relative cumbersomeness of plausible alternative measures that would protect the interests of the sovereigns involved.").

did not apply to state governments. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, the Court reexamined the doctrine that permitted federal prosecutors to use evidence unlawfully seized by state officers. *Id.* at 213. As this Court explained, the "foundation" of the doctrine—"that unreasonable state searches did not violate the Federal Constitution"—disappeared when the Court held in 1949 that the Fourth Amendment applied against the States. *Id.* Significantly, the Court underscored that the Fourteenth Amendment had recognized the Fourth Amendment's importance as an individual right that could be violated by either the federal government or state governments: "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

Four years later, in *Murphy*, the Court again recognized that repudiation of the dual-sovereignty doctrine followed naturally from the incorporation of the Bill of Rights against the States. There, the Court held that one jurisdiction could no longer compel a witness to give testimony that could be used to convict him of a crime in another jurisdiction. 378 U.S. at 77-78. As this Court explained, the incorporation of the Incrimination Clause against the States "necessitate[d] reconsideration of [the dual-sovereignty] rule." *Id.* at 57.

Both *Elkins* and *Murphy* stand for the fundamental propositions that "the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and . . . the federal and state governments should not be allowed to do in tandem what neither could do alone." Amar, *supra*, at 16. Those principles are no less applicable to the protections of the Double Jeopardy Clause. As discussed earlier, that Clause was adopted, in part, to prevent an individual from being "subject[ed] . . . to

embarrassment, expense and ordeal and compell[ed] . . . to live in a continuing state of anxiety and insecurity, as well as [the greater] possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-88. A person experiences those harms whenever he is "twice put in jeopardy of life or limb," regardless of whether the second prosecution is brought by a different sovereign or not.

The Fourteenth Amendment's incorporation of the Double Jeopardy Clause's protections against the States thus underscores what the Constitution's text, structure, and history all make clear: double jeopardy principles safeguard an individual right that protects against successive prosecutions, regardless of the sovereigns bringing those prosecutions.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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December 4, 2017

* Counsel of Record

No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 24, 2017
CERTIORARI GRANTED JUNE 28, 2018

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GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Court of Appeals Docket #: 16-16760
Docketed: 10/28/2016
Termed: 07/28/2017

* * *

Appeal From: Southern District of Alabama

* * *

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

versus

TERANCE MARTEZ GAMBLE,
Defendant – Appellant.

Date Filed	Docket Text
10/28/2016	CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant Terance Martez Gamble on 10/27/2016. Fee Status: IFP Granted.
	* * *
01/31/2017	Appellant's Brief filed by Terance Martez Gamble. (ECF: Barre Dumas)
	* * *
02/06/2017	Appendix filed [1 VOLUMES] by Appellant Terance Martez Gamble. (ECF: Barre Dumas)
	* * *
02/08/2017	Appellant's SEALED PSI for the Electronic ROA Program filed by

	Attorney Barre Clark Dumas for Appellant Terance Martez Gamble.
02/17/2017	Appellee's Brief filed by Appellee USA. (ECF: Christopher Brinson)
02/17/2017	Supplemental Appendix [1 VOLUMES] filed by Appellee USA. (ECF: Christopher Brinson)
	* * *
07/28/2017	Opinion issued by court as to Appellant Terance Martez Gamble. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.
07/28/2017	Judgment entered as to Appellant Terance Martez Gamble.
08/28/2017	Mandate issued as to Appellant Terance Martez Gamble.
11/02/2017	Notice of Writ of Certiorari filed as to Appellant Terance Martez Gamble. SC# 17-646.
	* * *
07/02/2018	Writ of Certiorari filed as to Appellant Terance Martez Gamble is GRANTED. SC# 17-646.--[Edited 08/13/2018 by SCW]

GENERAL DOCKET

U.S. District Court
Southern District of Alabama

CRIMINAL DOCKET FOR CASE #:
1:16-cr-00090-KD-B-1

Case Title: USA v. Gamble
Date Filed: 04/28/2016
Assigned to: Judge Kristi K. DuBose
Referred to: Magistrate Judge Sonja F. Bivins

Appeals court case number: 16-16760
11th Cir. USCA

* * *

Date Filed	#	Docket Text
04/28/2016	1	INDICTMENT as to Terance Martez Gamble (1) count(s) 1. (Attachments: # 1 Penalty Page, # 2 Signed Indictment) (tgw) (Entered: 04/29/2016)
		* * *
06/16/2016	17	MOTION for Leave to File *Motion to Dismiss Out of Time* by Terance Martez Gamble. (Dumas, Barre) (Entered: 06/16/2016)
06/16/2016	18	MOTION to Dismiss *Indictment (double jeopardy)* by Terance Martez Gamble. (Dumas, Barre) (Entered: 06/16/2016)
06/16/2016	19	MEMORANDUM in Support by Terance Martez Gamble re

		18 MOTION to Dismiss *Indictment (double jeopardy)* (Dumas, Barre) (Entered: 06/16/2016)
		* * *
06/21/2016	21	ORDER granting 17 Motion for Leave to File out of time as to Terance Martez Gamble (1); denying 18 Motion to Dismiss as to Terance Martez Gamble (1) as set out in order. Signed by Judge Kristi K. DuBose on 6/20/2016. (cmj) (Entered: 06/21/2016)
06/22/2016	22	MOTION to Continue in Interest of Justice by USA as to Terance Martez Gamble. (O'Brien, Michele) (Entered: 06/22/2016)
		* * *
06/23/2016	24	Second pretrial conference held 6/22/16. Motion to continue (doc. 22) is granted. ORDER TO CONTINUE - Ends of Justice as to Terance Martez Gamble Time excluded from 6/27/16 until 8/1/16. Jury Selection set for 8/1/2016 08:45AM. Waiver of Right to Speedy Trial due by 6/24/2016.. Signed by Magistrate Judge Sonja F. Bivins on 6/23/2016. (cmj) (Entered: 06/23/2016)
		* * *

07/12/2016	27	Notice of Intent to Plead Guilty to Count(s) One as to Terance Martez Gamble (Dumas, Barre) (Entered: 07/12/2016)
07/12/2016	28	ORDER as to Terance Martez Gamble. Change of Plea Hearing set for 7/14/2016 09:00 AM in US Courthouse, Courtroom 5A, 113 St. Joseph Street, Mobile, AL 36602 before Judge Kristi K. DuBose. The USM is directed to produce the defendant for this hearing. Signed by Magistrate Judge Katherine P. Nelson on 7/12/2016. (mcb) (Entered: 07/12/2016)
07/13/2016	29	PLEA AGREEMENT as to Terance Martez Gamble with factual resume (Dumas, Barre) (Entered: 07/13/2016)
07/14/2016	30	Order on Guilty Plea & Minute Entry entered as to Terance Martez Gamble. Guilty as to Count 1, charging the offense of 18:922(g)(1) Felon in Possession of Firearm. Defense Counsel Barre Dumas. Government Counsel Michele O'Brien. Defendant's guilty plea was accepted 7/14/2016 and Defendant was found guilty as charged. The plea agreement was written. The maximum

penalties are 10 yrs/$250,000 fine/3 yrs SRT/$100 SA. Pending sentencing Defendant shall remain in custody. Court Reporter Melanie Wilkins. This is a text only order. Sentencing set for 10/14/2016 11:00 AM in US Courthouse, Courtroom 5A, 113 St. Joseph Street, Mobile, AL 36602 before Judge Kristi K. DuBose. Presentence Investigation Report due 9/9/2016. On or before 9/30/2016 the parties shall each file a Position with Respect to Sentencing Factors in accordance with Criminal Local Rule 32(B)(4). In the event that the parties chose to file a Sentencing Memorandum, it shall be due seven (7) days prior to the date of sentencing. In the event that the parties decide to file a Motion to Continue Sentencing based upon defendant's incomplete cooperation with the Government, the motion shall be due four (4) days prior to the date of sentencing. Signed by Judge Kristi K. DuBose on 7/14/2016. (mcb) (Entered: 07/14/2016)

* * *

10/18/2016	–	Minute Entry for proceedings held before Judge Kristi K. DuBose:Sentencing held on 10/18/2016 for Terance Martez Gamble. Imprisonment 46 months; said sentence is to run concurrently with unrelated state case in 15-5596 and related state cases 16-2739 and 16-2740. Defendant shall receive credit for time served; SRT 3 years with special conditions; SA $100. The defendant was remanded to the custody of the U.S. Marshal. Court Reporter Melanie Wilkins. (mcb) (Entered: 10/19/2016)
10/24/2016	38	JUDGMENT as to Terance Martez Gamble. Imprisonment 46 months; said sentence is to run concurrently with unrelated state case in 15-5596 and related state cases 16-2739 and 16-2740. Defendant shall receive credit for time served; SRT 3 years with special conditions; SA $100. The defendant was remanded to the custody of the U.S. Marshal. Signed by Judge Kristi K. DuBose on 10/24/2016. (mcb) (Entered: 10/24/2016)

* * *

10/27/2016	40	NOTICE OF APPEAL by Terance Martez Gamble re: 38 Judgment, (Dumas, Barre) (Entered: 10/27/2016)
		* * *
11/09/2016	45	NOTICE OF FILING OF OFFICIAL TRANSCRIPT as to Terance Martez Gamble for the date of 07/14/2016, GUILTY PLEA HEARING, before Judge Kristi K. DuBose, re: 40 Notice of Appeal - Final Judgment, USCA Case Number 16-16760-A. Court Reporter Melanie Wilkins, CRR, RMR, Telephone number 251-690-3371. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. NOTICE: The parties have twenty-one (21) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. Notice of Transcript Redaction to be

		filed by 11/30/2016. Redaction Request due 11/30/2016. Redacted Transcript Deadline set for 12/12/2016. Release of Transcript Restriction set for 2/7/2017. (maw) (Entered: 11/09/2016)
		* * *
07/28/2017	48	OPINION/JUDGMENT of USCA (certified copy) as to Terance Martez Gamble re 40 Notice of Appeal - Final Judgment, USCA Case Number 16-16760, AFFIRMED. (Mandate to issue at a later date.) (jal) (Entered: 07/28/2017)
		* * *
08/28/2017	50	MANDATE of USCA (certified copy) as to Terance Martez Gamble. (jal) (Entered: 08/29/2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION

FILED IN OPEN COURT
APR 28 2016
CHARLES R. DIARD, JR.
CLERK

UNITED STATES OF AMERICA	*	
	*	
	*	**CRIMINAL NO.**
	*	**16-00090-KD**
v.	*	**USAO NO. 16R00066**
	*	
TERANCE MARTEZ GAMBLE	*	**VIOLATION:**
	*	**18 USC§ 922(g)(l)**

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

On or about November 29, 2015, in the Southern District of Alabama, Southern Division, the defendant,

TERANCE MARTEZ GAMBLE

having been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, to-wit: Robbery, Second Degree on September 4, 2008, in the Circuit Court of Mobile County, Alabama, case Number CC 2007-4148, did knowingly possess, in and affecting commerce, a firearm, to-wit: a SCCY, model CPX-2, 9mm handgun, serial number 136633.

In violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL

/s/ [signature of Foreman]
FOREMAN UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

KENYEN R. BROWN
UNITED STATES ATTORNEY

By:
/s/ Michele C. O'Brien
MICHELE C. O'BRIEN
Assistant United States Attorney

/s/ Vicki M. Davis
VICKI M. DAVIS
Assistant United States Attorney
Chief, Criminal Division

APRIL 2016

PENALTY PAGE

CASE STYLE:	**UNITED STATES v. TERANCE MARTEZ GAMBLE**
DEFENDANT:	**TERANCE MARTEZ GAMBLE (Count 1)**
USAO NO.	**16R00066**
AUSA:	**Michele C. O'Brien**
CODE VIOLATION:	
COUNT 1:	**18 USC § 92(g)(1), Possession of a Firearm by a Prohibited Person (felon)**
PENALTY:	
COUNT 1:	**10 yrs/$250,000/3 yrs SRT/$100SA (statutory minimum mandatory 15 yrs (to life) and 5 yrs SRT, if subject to provisions of 18 U.S.C. § 924(e))**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
vs.	:	**CRIMINAL NO. 16-00090-KD**
TERANCE MARTEZ GAMBLE,	:	
Defendant.	:	

ORDER

A second pretrial conference was held on June 22, 2016, before the undersigned Magistrate Judge. Participating in the conference were Barre Dumas, counsel for Defendant Terance Martez Gamble, and Assistant U.S. Attorney Michele O'Brien, counsel for the Government.

At the pretrial conference, Ms. O'Brien requested a continuance, and subsequent to the conference, she filed a written motion. (Doc 22). Ms. O'Brien reported that this case will be resolved without a trial; however, additional time is needed because the U.S. Attorney's Office has requested and is awaiting direction from the Department of Justice about resolution of this case due to the fact that Defendant has already been prosecuted in state court based on the facts alleged in the indictment in this case. Ms. O'Brien also reported that she fully expects to receive direction from the Department of Justice within the next couple of days. Counsel for Defendant reported that Defendant does

not oppose the Government's continuance request, and that it is in Defendant's best interest to await a decision from the Department of Justice before proceeding in this case.

Upon consideration, the undersigned concludes that the ends of justice served by continuing this action for one term outweigh the best interests of the public and Defendant in a speedy trial. 18 U.S.C.A. § 3161(h)(7)(A). This is the first trial setting, and the Government is awaiting direction from the Department of Justice about resolution of this case. The undersigned finds, under the circumstances, that continuing this action pending the decision from the Department of Justice is reasonable under the circumstances. 18 U.S.C.A. § 3161(h)(7)(A). Accordingly, the request for a continuance is **GRANTED**. **This case is hereby CONTINUED to the August 2016 criminal term, with jury selection on August 1, 2016.** For purposes of the Speedy Trial Act, any delay resulting from this continuance is excludable pursuant to 18 U.S.C. § 3161(h)(7)(A).

Counsel for Defendant shall file, on or before **June 24, 2016,** a Speedy Trial Waiver executed by Defendant and his counsel. The waiver shall include language which reflects that (A) counsel has discussed the reasons for seeking a continuance with Defendant; (B) Defendant understands that the time requested in the motion to continue trial of this matter will be excluded from any calculations of time under the Speedy Trial Act; and (C) with this understanding and knowledge, Defendant agrees to a continuance of this action to the August 2016 trial term.

The Clerk is directed to refer this action to Magistrate Judge Nelson.

DONE this **23rd** day of **June, 2016.**

/s/ SONJA F. BIVINS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION

UNITED STATES	)	
OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO.**
	)	**16-00090**
TERANCE	)	
MARTEZ GAMBLE	)	

PLEA AGREEMENT

The defendant, **TERANCE MARTEZ GAMBLE**, represented by his counsel, and the United States of America have reached a plea agreement in this case, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the terms and conditions of which are as follows:

RIGHTS OF THE DEFENDANT

1. The defendant understands his rights as follows:
   a. To be represented by an attorney;
   b. To plead not guilty;
   c. To have a trial by an impartial jury;
   d. To confront and cross-examine witnesses and to call witnesses and produce other evidence in his defense; and
   e. To not be compelled to incriminate himself.

WAIVER OF RIGHTS AND PLEA OF GUILTY

2. The defendant waives rights b through e, listed above, and pleads guilty to Count One of the Indictment, charging a violation of Title 18, United States Code, Section 922(g)(1), possession of a firearm by a prohibited person.

3. The defendant understands that the statements he makes under oath in the plea of guilty must be completely truthful and that he can be prosecuted for making false statements or perjury, or receive a perjury enhancement at sentencing, for any false statements be makes intentionally in this plea of guilty.

4. The defendant expects the Court to rely upon his statements here and his response to any questions that he may be asked during the guilty plea hearing.

5. The defendant is not under the influence of alcohol, drugs, or narcotics. He is certain that he is in full possession of his senses and is mentally competent to understand this Plea Agreement and the guilty plea hearing which will follow.

6. The defendant has had the benefit of legal counsel in negotiating this Plea Agreement. He has discussed the facts of the case with his attorney, and his attorney has explained to the defendant the essential legal elements of the criminal charge which has been brought against him. The defendant's attorney has also explained to the defendant his understanding of the United States' evidence and the law as it relates to the facts of his offense.

7. The defendant understands that the United States has the burden of proving each of the legal elements of the criminal charge beyond a reasonable doubt. The defendant and his counsel have discussed possible defenses to the charge. The defendant believes that his attorney has represented him faithfully, skillfully, and diligently, and he is completely satisfied with the legal advice of his attorney.

8. A separate document, entitled Factual Resume, will be submitted to the Court as evidence at the guilty plea hearing. The Factual Resume is incorporated by reference into this Plea Agreement. The defendant and the United States agree that the Factual Resume is true and correct. Alterations to the Plea Agreement or Factual Resume initialed only by the defendant and his counsel are not part of this agreement and are not agreed to by the United States.

9. This plea of guilty is freely and voluntarily made and is not the result of force, threats, promises, or representations, apart from those representations set forth in this Plea Agreement. There have been no promises from anyone as to the particular sentence that the Court will impose. The defendant is pleading guilty because he is guilty.

10. The defendant also knowingly and voluntarily waives all rights, whether asserted directly or through a representative, to receive from the United States after sentencing any further records, reports, or documents pertaining to the investigation or prosecution of this matter. This waiver includes, but is not limited to, rights under

the Freedom of Information Act and the Privacy Act of 1974.

PENALTY

11. The maximum penalty the Court could impose as to Count One of the Indictment is:

a. 10 years imprisonment (However, it is possible that the defendant could be subject to a mandatory term of imprisonment of 15 years to life pursuant to 18 U.S.C. § 924(e));

b. A fine not to exceed $250,000;

c. A term of supervised release of three years, which would follow any term of imprisonment (However, it is possible that the defendant could be subject to a term of supervised release of up to five years pursuant to 18 U.S.C. § 924(e)). If the defendant violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release;

d. A mandatory special assessment of $100.00; and

e. Such restitution as may be ordered by the Court.

SENTENCING

12. The Court will impose the sentence in this case. The United States Sentencing Guidelines are advisory and do not bind the Court. The defendant has reviewed the application of the Guidelines with his attorney and understands that no one can predict with certainty what the sentencing range will be in this case until after a pre-sentence investigation has been completed and the Court has ruled on the results of that investigation. The

defendant understands that at sentencing, the Court may not necessarily sentence the defendant in accordance with the Guidelines. The defendant understands that he will not be allowed to withdraw his guilty plea if the advisory guideline range is higher than expected, or if the Court departs or varies from the advisory guideline range.

13. The defendant understands that this Plea Agreement does not create any right to be sentenced in accordance with the Sentencing Guidelines, or below or within any particular guideline range, and fully understands that determination of the sentencing range or guideline level, or the actual sentence imposed, is solely the discretion of the Court.

14. The United States will provide all relevant sentencing information to the Probation Office for purposes of the pre-sentence investigation. Relevant sentencing information includes, but is not limited to, all facts and circumstances of this case and information concerning the defendant's conduct and background.

15. Both the defendant and the United States are free to allocute fully at the time of sentencing.

16. The defendant agrees to tender $100.00 to the U.S. District Court Clerk in satisfaction of the mandatory special assessment in this case. The United States reserves the right to withdraw any favorable recommendations it may agree to within this document if the defendant fails to pay the special assessment prior to or at the time of his sentencing.

RESTITUTION

17. Pursuant to 18 U.S.C. §§ 3556 and 3663(A), restitution is mandatory. The defendant agrees to make full restitution in an amount to be determined by the Court at sentencing.

FORFEITURE

18. The defendant agrees to confess the forfeiture to the United States of all properties which represent proceeds of his criminal activities or which facilitated any aspect of these illegal activities.

FINANCIAL OBLIGATIONS

19. The Defendant expressly authorizes the U.S. Attorney's Office to obtain a credit report in order to evaluate the Defendant's ability to satisfy any financial obligation imposed by the Court. In order to facilitate the collection of financial obligations to be imposed in connection with this prosecution, the Defendant agrees to disclose fully all assets in which the Defendant has any interest or over which the Defendant exercises control, directly or indirectly, including those held by a spouse, nominee or other third party.

UNITED STATES' OBLIGATIONS

20. The United States will not bring any additional charges against the defendant related to the facts underlying the Indictment and will move to dismiss any remaining charges against the defendant once sentence is imposed in this case. This agreement is limited to the United States Attorney's Office for the Southern District of Alabama and does not bind any other federal, state, or local prosecuting authorities.

21. The United States will recommend to the Court that the defendant be sentenced at the low end of the advisory sentencing guideline range as determined by the Court.

LIMITED WAIVER OF RIGHT TO APPEAL AND WAIVER OF COLLATERAL ATTACK

22. As part of the bargained-for exchange represented in this plea agreement, and subject to the limited exceptions below, the defendant knowingly and voluntarily waives the right to file any direct appeal or any collateral attack, including a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. Accordingly, the defendant will not challenge his guilty plea, conviction, or sentence in any district court or appellate court proceedings.

a. **EXCEPTIONS.** The defendant reserves the right to timely file a direct appeal challenging:

(1) any sentence imposed in excess of the maximum statutory penalty provided by 18 U.S.C. § 922(g) (10 years) or 18 U.S.C. § 924(e) (life), whichever is deemed to apply by the court in its sole discretion at sentencing;

(2) any sentence which constitutes an upward departure or variance from the advisory guideline range.

The defendant also reserves the right to claim ineffective assistance of counsel in a direct appeal or § 2255 motion;

(3) the Court's Order entered on June 21, 2016, denying the Defendant's Motion to Dismiss.

23. If the United States files a notice of appeal and such appeal is authorized by the Solicitor General,

the defendant is released from the appellate waiver.

24. The defendant further reserves the right to timely move the district court for an amended sentence under 18 U.S.C. § 3582 in the event of a future retroactive amendment to the Sentencing Guidelines which would affect the sentence.

25. ~~If the defendant receives a sentence within or below the advisory guideline range, this plea agreement shall serve as the defendant's express directive to defense counsel to timely file a "Notice of Non-Appeal" following sentencing, signed by the defendant.~~

VIOLATION OF AGREEMENT

26. The defendant understands that if he breaches any provision of this Plea Agreement, the United States will be free from any obligations imposed by this agreement, but all provisions of the agreement remain enforceable against the defendant. In the exercise of its discretion, the United States will be free to prosecute the defendant on any charges of which it has knowledge. In such event, the defendant agrees not to assert any objections to prosecution that he might have under the Sixth Amendment and/or Speedy Trial Act.

27. In addition, if the defendant is released from detention prior to sentencing, he understands that the United States will no longer be bound by this agreement if he violates any condition of his release prior to sentencing or prior to serving his sentence after it is imposed.

ENTIRETY OF AGREEMENT

28. This document is the complete statement of the agreement between the defendant and the United States and may not be altered unless done so in writing and signed by all the parties.

Respectfully submitted,

KENYEN R. BROWN
UNITED STATES ATTORNEY

Date:
June 22, 2016

s/ Michele C. O'Brien
MICHELE C. O'BRIEN
Assistant United States Attorney

Date: 6/22/2016

s/ Sean P. Costello
SEAN P. COSTELLO
Assistant United States Attorney
Deputy Chief, Criminal Division

I have consulted with my counsel and fully understand all my rights with respect to the offense charged in the Indictment pending against me. I have read this Plea Agreement and carefully reviewed every part of it with my attorney. I understand this agreement, and I voluntarily agree to it. I hereby stipulate that the Factual Resume, incorporated herein, is true and accurate in every respect, and that had the matter proceeded to trial, the United States

could have proved the same beyond a reasonable doubt.

Date: 7/12/16 s/ Terance Martez Gamble
TERANCE MARTEZ GAMBLE
Defendant

I am the attorney for the defendant. I have fully explained his rights to him with respect to the offense(s) charged in the Indictment in this matter. I have carefully reviewed every part of this Plea Agreement with him. To my knowledge, his decision to enter into this agreement is an informed and voluntary one. I have carefully reviewed the Factual Resume, incorporated herein, with the defendant and to my knowledge, his decision to stipulate to the facts is an informed, intelligent and voluntary one.

Date: 7/12/16 s/ Barre C. Dumas
BARRE C. DUMAS
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION

UNITED STATES	)	
OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO.**
	)	**16-00090**
TERANCE	)	
MARTEZ GAMBLE	)	

FACTUAL RESUME

The defendant, **TERANCE MARTEZ GAMBLE**, admits the allegations of Count One of the Indictment.

ELEMENTS OF THE OFFENSE

TERANCE MARTEZ GAMBLE understands that in order to prove a violation of Title 18, United States Code, Section 922(g)(1), as charged in Count One of the Indictment, the United States must prove:

First: the Defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and

Second: before the Defendant possessed the firearm the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

OFFENSE CONDUCT

Defendant, **TERANCE MARTEZ GAMBLE**, admits in open court and under oath that the following statement is true and correct and constitutes evidence

in this case. This statement of facts is provided solely to assist the Court in determining whether a factual basis exists for **TERANCE MARTEZ GAMBLE'S** plea of guilty. The statement of facts does not contain each and every fact known to **TERANCE MARTEZ GAMBLE** and to the United States concerning the defendant's involvement in the charges set forth in the plea agreement.

GAMBLE was previously convicted of Robbery, Second Degree on September 4, 2008, in the Circuit Court of Mobile County, Alabama, Case No. CC 2007-4148.

On November 20, 2015, at approximately 11:00 p.m. an Officer of the Mobile Police Department was on patrol in the area of Cottage Hill Road and Demetroplis Road when he observed a black Dodge Charge travelling westbound on Cottage Hill Road with the driver side headlight out. The Officer turned around and initiated a traffic stop in the nearby McDonald's parking lot. Upon approaching the vehicle the Officer noticed the strong odor of marijuana coming from the vehicle. When asked about the odor the driver (GAMBLE) said he had just dropped off a friend but otherwise there were no illegal drugs in the vehicle. The Officer removed GAMBLE from the vehicle and performed a pat down and a search of the driver's area. The odor of marijuana grew stronger around the steering column and Officers discovered a void in that area, and removed a loaded firearm (a SCCY, model CPX-2, 9mm handgun, serial number 136633), digital scale and two baggies of marijuana. The firearm was manufactured outside the State of Alabama and therefore its presence affected interstate commerce.

AGREED TO AND SIGNED.

Respectfully submitted,

KENYEN R. BROWN
UNITED STATES
ATTORNEY

Date:
June 22, 2016

s/ Michele C. O'Brien
MICHELE C. O'BRIEN
Assistant United States
Attorney

Date: 6/22/2016

s/ Sean P. Costello
SEAN P. COSTELLO
Assistant United States
Attorney
Deputy Chief, Criminal
Division

Date: 7/12/16

s/ Terance Martez Gamble
TERANCE MARTEZ
GAMBLE
Defendant

Date: 7/12/16

s/ Barre C. Dumas
BARRE C. DUMAS
Attorney for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	§	**JUDGMENT IN A CRIMINAL CASE**
	§	
v.	§	
	§	**Case Number:**
	§	**1:16-CR-00090-KD-B(1)**
TERANCE MARTEZ GAMBLE	§	**USM Number: 16396-003**
	§	
	§	**Barre C. Dumas**
	§	**Defendant's Attorney**

THE DEFENDANT:

☒ **pleaded guilty to count 1 of the Indictment on 7/14/2016.**

☐ pleaded nolo contendere to count(s) which was accepted by the court

☐ was found guilty on count(s) after a plea of not guilty

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:922G.F Possession Of A Firearm By A Prohibited Person (Felon)	11/29/2015	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

October 18, 2016
Date of Imposition of Judgment

s/Kristi K. DuBose
Signature of Judge

KRISTI K. DuBOSE
UNITED STATES
DISTRICT JUDGE
Name and Title of Judge

October 24, 2016
Date

DEFENDANT: TERANCE MARTEZ GAMBLE
CASE NUMBER: 1:16-CR-00090-KD-B(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

46 Months as to Count 1; said sentence is to run concurrently with unrelated state case in 15-5596 and related state cases 16-2739 and 16-2740; defendant shall receive credit for time served as calculated by the BOP.

☒ The court makes the following recommendations to the Bureau of Prisons:

Defendant be allowed to participate in a substance abuse treatment program, while incarcerated.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ☐ a.m. ☐ p.m. on
- ☐ as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Three (3) years.**

☒ Special Conditions:

Defendant shall enroll in and complete an intensive substance abuse treatment program for the first three months of supervised release, as directed by the Probation Office; then, the defendant shall submit to periodic urine surveillance and/or breath, saliva and skin tests for the detection of drug abuse as directed by the probation officer. The defendant may incur costs associated with such detection efforts, based upon ability to pay as determined by the probation officer; the defendant shall participate in an assessment or a program, inpatient or outpatient, for the treatment of drug and/or alcohol addiction, dependency or abuse, as instructed and as deemed necessary by the probation officer. The defendant may incur costs associated with such drug/alcohol detection and treatment, based upon the ability to pay, as determined by the probation officer; and, the defendant shall submit his person, house, residence, vehicle(s), papers, [computers (as defined by 18 U.S.C. Section 1030(e)(1)) or other electronic communications or data storage devices of media], business or place of employment, and any other property under the defendant's control to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search in accordance with this condition may be grounds for revocation. The

defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. No fine was imposed, as the defendant is unable to pay. A $100 special monetary assessment was imposed.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.*)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (*Check, if applicable.*)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable.*)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant must

report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court.

The defendant shall also comply with the additional conditions on the attached page.

See Page 4 for the "STANDARD CONDITIONS OF SUPERVISION"

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. the defendant shall cooperate, as directed by the probation officer, in the collection of DNA, if applicable, under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Page 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$.00	$.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. (or see attached) However, pursuant to 18 U.S.C. § 3644(i), all non-federal victims must be paid in full prior to the United States receiving payment.

☐ If applicable, restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Page 6 may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $100.00 due immediately, balance due not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or with

B ☐ Payment to begin ☐ C, ☐ D, ☐ F immediately (may be or below); or combined with

C ☐ Payment in equal_____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL NO.
	)	CR16-00090
	)	COURTROOM 5A
VS.	)	U. S. FEDERAL
	)	COURTHOUSE
	)	MOBILE,
	)	ALABAMA
TERANCE MARTEZ GAMBLE ,	)	JULY 14, 2016
	)	
DEFENDANT.	)	

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE KRISTI K. DuBOSE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: Michele C. O'Brien, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
63 South Royal Street,
Suite 600
Mobile, Alabama 36602

FOR DEFENDANT TERANCE MARTEZ GAMBLE:

Dumas & McPhail, LLC
By: Barre C. Dumas, Esq.
P.O. Box 870
Mobile, Alabama 36601

COURT REPORTER: Melanie Wilkins, RMR, CRR
Official Court Reporter

Proceedings reported by machine stenography
Transcript produced by computer

[July 14, 2016, 9:04 a.m. The defendant is present with counsel in open court.]

THE CLERK: We are on the record for a change of plea hearing in Criminal No. 16-90, United States of America versus Terance Gamble.

What says the Government?

MS. O'BRIEN : The United States is ready.

THE CLERK: And the defendant ?

MR. DUMAS: The defendant is here and ready.

THE COURT: Mr. Gamble —

Would you pull the microphone ?

Mr. Gamble, I need to ask you some questions to determine whether you are competent to plea and whether this is a voluntary plea. If you would raise your right hand, please.

[Defendant duly sworn.]

THE COURT: Okay. Give me your full name, please.

THE DEFENDANT: Terance Martez Gamble.

THE COURT: How old are you?

THE DEFENDANT: Twenty-seven.

THE COURT: How far did you go in school?

THE DEFENDANT: To the 11th grade.

THE COURT: Can you read, write, and understand the English language?

Page 3

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you had any problems communicating with your attorney?

THE DEFENDANT: No, ma'am.

THE COURT: Did he explain the charge to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you ever been treated for any type of mental illness?

THE DEFENDANT: Younger.

THE COURT: Say it again.

THE DEFENDANT: Younger.

THE COURT: "Younger"?

THE DEFENDANT: Yes, ma'am.

THE COURT: When you were younger you were?

THE DEFENDANT: Yes, ma'am.

THE COURT: What type was that?

THE DEFENDANT: I was just going to counseling.

THE COURT: You went to counseling. It was for bipolar or ADD or any of those kind of things?

THE DEFENDANT: Something like that.

THE COURT: What?

THE DEFENDANT: Something like that.

THE COURT: Do you take any medication for that ?

THE DEFENDANT: No, ma'am.

THE COURT: And have you ever been treated for drug

addiction?

THE DEFENDANT: Yes, ma'am.

THE COURT: And when was that ?

THE DEFENDANT: I'm not sure of the year.

THE COURT: Okay. When you were a teenager? In your early twenties?

THE DEFENDANT: Yes, ma'am.

THE COURT: Were you incarcerated at the time?

THE DEFENDANT: Kind of. Something.

THE COURT: Something like that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you remember where you were treated?

THE DEFENDANT: I want to say at The Bridge.

THE COURT: At The Bridge?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Are you currently under the influence of any drug , alcohol, or medication?

THE DEFENDANT: No, ma'am.

THE COURT: Okay. Mr. Dumas, have you had any problems communicating with your client ?

MR. DUMAS: I have not, Your Honor. We've met several times, and he seems to be able to communicate and understand me.

THE COURT: Okay. And did you and your attorney talk about possible defenses to this case?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. You talked about the facts, and then you talked about if you went to trial how you might defend yourself?

THE DEFENDANT: Yes, ma'am.

THE COURT: And, after doing so, are you satisfied with his advice to you that you should plead guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: And are you satisfied with his representation in general of you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, you are pleading pursuant to a plea agreement. The plea agreement provides that in return for your guilty plea, the Government is going to recommend that you be sentenced at the low end of the guidelines. It also provides you the opportunity, if you wish, to cooperate with the Government.

Is that the way you understand it?

MR. DUMAS: Actually, it does not contain a 5K provision, Your Honor .

THE COURT: I'm sorry. You are absolutely right. It does not. It just has a recommendation of low end of the guidelines.

Is that the way you understand it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Now, did you read that plea agreement and discuss it with your attorney before you signed it?

THE DEFENDANT: Yes, ma'am.

THE COURT: And has anybody promised you anything different than what's included in that plea agreement?

THE DEFENDANT: No, ma'am.

THE COURT: Okay. Now, the plea agreement does provide that you are waiving your right appeal the sentence that I give you. Do you understand that?

MR. DUMAS: Your Honor, he's waiving the right to appeal a sentence if appropriately ordered. However, he is reserving an issue for appeal relative to a double jeopardy claim under the Fifth Amendment that was articulated in a Motion to Dismiss the indictment, which Your Honor denied.

THE COURT: Is that part of the plea agreement?

MS. O'BRIEN : It is, Your Honor. It's on page 7, subparagraph 3.

THE COURT: Oh, here it is. Okay.

MR. DUMAS: Justice Ginsburg, in a concurring opinion, wrote a very short concurrence wherein she stated that she believed that the issue of double jeopardy for prosecutions by the federal Government —

THE COURT: Right, I'm familiar with that. In fact, I noted in here — okay. And so you are saying that he's

already pled guilty to the same firearm in a state court proceeding?

MR. DUMAS: Yes, Your Honor.

THE COURT: Okay. All right. Well, that is noted. Let me go through and read this directly to get this

correctly in the record here. Sorry about that. I had actually attached Mr. Wiggins' plea agreement to this, and that's why I'm confused. Let me get back on track here.

All right. So in your case you are reserving the right to appeal any sentence imposed in excess of the statutory maximum, which is 922(g), which is up to 10 years in prison.

MR. DUMAS: That's correct.

THE COURT: Okay. Is there a question whether the 924 (e) applies?

MS. O'BRIEN : Your Honor, it appears from the probation officer conference report that the defendant has two prior crimes of violence, but, as I understand Your Honor's policy, if it turned out that he was Armed Career Criminal eligible pursuant to 924(e), you would allow the defendant to withdraw his plea.

THE COURT: Do you understand that?

MR. DUMAS: Actually, we did not discuss that. If you'll give me one minute, I'll make it clear to him.

THE COURT: Okay.

[The defendant and counsel confer off the record.]

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THE COURT: All right. So basically what I need to explain to you are there's very limited circumstances in which you could appeal. In other words, if you come in here and I give you a sentence that's below the statutory maximum or I give you a sentence that's within the guidelines, the only reason that you can appeal is to appeal the order that was entered on June the 21st, 2016, on your Motion to Dismiss.

Do you understand that? That's pretty much the only reason you are going to be able to appeal is based on the Court's denial of your Motion to Dismiss. Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. All right. Has anybody tried to force you to plead guilty today?

THE DEFENDANT: No, ma'am.

THE COURT: Okay. Now, you are pleading to a felony offense. You lose the right to vote, the right to hold public office, and the right to a firearm. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: There are sentencing guidelines that apply to your case. Have you gone over those with your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: You understand those are just advisory, and I'm not required to follow them?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, you do have a right to continue in your plea of not guilty. We would have a trial. At trial, you would be presumed innocent. The Government would have to prove your guilt beyond a reasonable doubt. At trial, you would have the right to the assistance of counsel. You would have the right to cross-examine the Government's witnesses. You'd have the right to compel witnesses to attend the trial on your behalf.

You'd also have the right to choose to testify or not testify. If you chose not to testify, that fact cannot be used against you.

But do you understand by pleading guilty today, you are giving up those rights and there will not be a trial?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is that what you want to do?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. If the Government would give me the elements and the facts, please.

MS. O'BRIEN : Your Honor, in order to prove the defendant guilty of a violation of Title 18 United States Code Section 922(g)(1), as charged in Count 1 of the indictment, the United States must prove that the defendant knowingly possessed a firearm in or affecting interstate commerce; and that before the defendant possessed the firearm, he had been convicted in a court of a crime punishable by imprisonment for a term in

excess of one year, that is, a felony offense.

The United States would expect the evidence to show that the defendant was previously convicted of Robbery Second Degree here in Mobile County in 2008.

Subsequent to that conviction, on November 20th, 2015, at approximately 11:00 p.m., an officer of the Mobile Police Department was on patrol in the area of Cottage Hill Road and Demopolis Road. And he observed a vehicle, a black Dodge Charger, traveling west on Cottage Hill Road, observing the defendant with a headlight out.

The officer initiated a traffic stop. Upon approaching the vehicle, the officer noticed the strong odor of marijuana emanating from the vehicle. When asked about the odor, the defendant said he had just dropped off a friend, but, otherwise, there were no illegal drugs in the vehicle.

The officer removed the defendant from the vehicle and performed a pat-down search and a search of the driver's area.

The odor of marijuana was stronger around the steering column, and the officer discovered a void in that area and removed from that area a loaded firearm, a 9-millimeter handgun, described in the indictment and the factual resume, digital scales, and two baggies of marijuana. The firearm was manufactured outside the State of Alabama, and, therefore, its presence affected interstate commerce.

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THE COURT: Do you agree the Government could prove those facts against you?

THE DEFENDANT: Yes, ma'am.

THE COURT: And how do you plead?

THE DEFENDANT: Guilty.

THE COURT: It's the finding of the Court in the case of the United States versus Terance Martez Gamble that the defendant is fully competent and capable of entering an informed plea and that the defendant is aware of the nature of the charges and the consequences of the plea and that the plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the

essential elements of the offense. The plea is accepted, and you're adjudicated guilty of Count 1.

There was one thing I did neglect to tell you. I was talking to you about the up to 10 years in prison, but there's also a $250,000 fine, 3 years supervised release, and $100 special assessment.

Do you understand those to be the penalties?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And you reaffirm your guilty plea?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. A written presentence report will be prepared by the probation officer, and you'll be

interviewed. Your attorney may be present during that interview. They'll prepare a report.

Your sentencing date is set for October the 14th at 11: 00 o'clock. At that time you may speak on your own behalf, and you may present witnesses.

Do you have any questions?

THE DEFENDANT: No, ma'am.

MR. DUMAS: Your Honor, if I may, just in an abundance of caution, make sure my record is clear. As Ms. O'Brien was going over the factual resume, I would submit to the Court that those are the very facts to which he pled guilty at the Circuit Court of Mobile County, Alabama, and it is that conviction which, of course, contributed to his consideration of the plea here, having already pled to it in state court. And it is that conviction which we would submit and did submit in our Motion to Dismiss the Indictment raises the

issue of possible double jeopardy violations in this prosecution.

THE COURT: Okay. All right. I think the record is clear. Thank you.

All right. Anything else?

MS. O'BRIEN : No, ma'am.

THE COURT: All right. Thank you.

MR. DUMAS: Thank you, Judge.

[Recess.]

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UNITED STATES OF AMERICA
VS.
TERANCE MARTEZ GAMBLE
CASE NO. CR16-000 90

I, Melanie Wilkins, do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision using computer-aided transcription, and that the foregoing represents a true and correct transcript of the proceedings upon said hearing.

I further certify that I am neither counsel nor related to the parties to the action, nor am I in anywise interested in the result of said cause.

Pages 1 to 13.

Dated: November 09, 2016

/s/ Melanie Wilkins

Melanie Wilkins
Registered Merit Reporter
Certified Realtime Reporter
Official Court Reporter
United States District Court
Southern District of Alabama
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No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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QUESTION PRESENTED

Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

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The Eleventh Circuit's opinion is reported at 694 Fed. Appx. 750. The District Court's unpublished opinion denying Gamble's motion to dismiss is available at 2016 WL 3460414.

JURISDICTION

The Eleventh Circuit entered judgment on July 28, 2017. This Court granted certiorari on June 28, 2018, and has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

The Fifth Amendment's Double Jeopardy Clause guarantees that "No person shall . . . be twice put in jeopardy" "for the same offence." That guarantee rang hollow for Terance Martez Gamble, who, as a consequence of the Court-created separate-sovereigns exception, has been subjected to two convictions, and two sentences, for the single offense of being a felon in possession of a firearm. As a result of this double-conviction and double-sentencing—and contrary to the text, original meaning, and purpose of the Double Jeopardy Clause—he must spend three additional years of his life behind bars.

1. In 2008, Gamble was convicted of second-degree robbery in Mobile County, Alabama. J.A. 27. Because second-degree robbery is a felony offense in Alabama, both federal and state law barred him from

subsequently possessing a firearm. *See* Ala. Code §§ 13A-11-70(2), 13A-11-72(a); 18 U.S.C. § 922(g)(1).

2. More than seven years later, on November 29, 2015, Gamble was driving in Mobile when a police officer pulled him over for a faulty headlight. *See* J.A. 27. The officer smelled marijuana and, upon searching Gamble's car, discovered two baggies of marijuana, a digital scale, and a 9mm handgun. *See id.*

3. Alabama prosecuted Gamble for possessing marijuana and violating a state law that "prohibits a convicted felon from possessing a pistol." *Ex parte Taylor*, 636 So. 2d 1246, 1246 (Ala. 1993); *see* Ala. Code §§ 13A-11-70(2), 13A-11-72(a). Gamble received a one-year sentence. Dist. Ct. ECF No. 34 at 7.

4. While the state prosecution was pending, the federal government charged Gamble for the same offense under federal law: being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1) (prohibiting felons from "possess[ing] in or affecting commerce[ ] any firearm"). The federal charge was premised on "the same incident of November 29, 2015 that gave rise to his state court conviction." Pet. App. 6a; *see also* J.A. 27.

Gamble raised one and only one objection to his federal prosecution: that it violated his "Fifth Amendment [right] against being placed twice in jeopardy for the same crime." Dist. Ct. ECF No. 18 at 1. He moved to dismiss his federal indictment on that ground. *Id.*

The District Court, in a thorough opinion, denied Gamble's motion. Pet. App. 5a–10a. Although the court recognized that Gamble had been subject to

duplicative prosecutions, it had no choice but to adhere to this Court's separate-sovereigns exception. "[U]nless and until the Supreme Court overturns" that exception, the District Court concluded, "Gamble's Double Jeopardy claim must . . . fail." *Id.* at 10a.

In light of that decision, Gamble entered a conditional guilty plea, preserving his right to appeal the District Court's denial of his double-jeopardy claim. J.A. 22, 47–48. The court sentenced him to 46 months in prison, three years of supervised release, and payment of a $100 special assessment. *Id.* at 15–20. He is set to be released on February 16, 2020—nearly three years after he would have been released from custody based on the state sentence alone. Bureau of Prisons Find An Inmate, "Terance Martez Gamble," https://www.bop.gov/inmateloc (last visited August 31, 2018).

5. Gamble appealed the "issue preserved in writing in his Plea Agreement and preserved on the record at his Plea Hearing"—namely, whether the federal prosecution violated "his rights pursuant to the Double Jeopardy clause of the Fifth Amendment." Dist. Ct. ECF No. 40 at 1. The government opposed solely on the basis of the separate-sovereigns exception. 11th Cir. Gov't Br. at 3–5. And the Eleventh Circuit issued a *per curiam* opinion affirming the decision below. Like the District Court, the Court of Appeals was bound to follow this Court's precedent. "[U]nless and until the Supreme Court overturns *Abbate*," the court reasoned, "the double jeopardy claim must fail based on the dual sovereignty doctrine." Pet. App. 2a.

6. Gamble petitioned this Court for review of the Eleventh Circuit's ruling. In opposition to certiorari, the government again relied exclusively on the separate-sovereigns exception. Accordingly, as this case comes to the Court, Mr. Gamble's continued imprisonment rests solely on the Court-created separate-sovereigns exception to the Double Jeopardy Clause. On June 28, 2018, this Court granted certiorari to decide whether to overrule that exception.

SUMMARY OF ARGUMENT

This Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause.

I. The separate-sovereigns exception is incompatible with the text, original meaning, and purpose of the Double Jeopardy Clause.

A. The text of the Double Jeopardy Clause contemplates no exceptions to its blanket guarantee of protection from double prosecution and punishment for the same offense. Congress could have written the Clause to exclude prior state convictions, but did not. It considered and rejected such an exclusion, instead choosing a Clause phrased in absolute terms.

B. The separate-sovereigns exception also contravenes the original meaning of the Double Jeopardy Clause, leaving the Clause less protective of liberty today than it was in 1791.

1. The framers of the Bill of Rights understood the Double Jeopardy Clause to incorporate English common law protections against successive prosecutions, including the well-established rule barring successive prosecutions by separate

sovereigns. A long line of English cases, dating to at least 1662, specifically and unequivocally rejected the notion that two sovereigns could punish a defendant for the same crime. And numerous English treatises from the Founding Era uniformly reflected this same rule.

2. Early American sources are in accord. This Court's decisions—in *Houston v. Moore*, 18 U.S. 1 (1820), and *United States v. Furlong*, 18 U.S. 184 (1820)—pay homage to the firmly established traditional rule that prosecution by one sovereign bars prosecution by another. Nearly every state court followed the same rule. As one court summarized the early understanding: It is "against natural justice" for a defendant to be "cropped in one" state, "branded and whipped in another, imprisoned in a third, and hanged in a fourth; and all for one and the same offense." *State v. Brown*, 2 N.C. 100, 101 (1794). Early treatises on American law only reinforce this understanding.

3. In contrast to the unassailable pedigree of the traditional rule, the separate-sovereigns exception did not arise until well over half a century after the founding, and then only in dicta under ignominious circumstances. The first outright embrace of the exception occurred in a fugitive slave case, *Moore v. Illinois*, 55 U.S. 13 (1852), that said nothing about *Houston* or *Furlong*, the traditional English common law rule, or why the framers would have rejected that rule *sub silentio*. And the separate-sovereigns exception did not achieve the status of a holding for another 70 years, when the Court decided *United States v. Lanza*, 260 U.S. 377 (1922), a Prohibition Era decision that was driven by policy considerations

and entirely devoid of any inquiry into the original understanding of the Double Jeopardy Clause. The last time the Court squarely took up the question, in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), the Court sharply divided, and the majority refused to consider overwhelming evidence of the Clause's original meaning.

C. The separate-sovereigns exception likewise conflicts with the purpose of the Double Jeopardy Clause and core principles of federalism.

1. "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," with roots in Greek and Roman law. *Bartkus*, 359 U.S. at 151 (Black, J., dissenting). The purpose of the Double Jeopardy Clause is to protect against this most ancient and basic of evils. Permitting consecutive prosecutions for the same offense simply because different sovereigns initiate them "hardly serves" the deeply rooted principles of finality and fairness the Clause was designed to protect. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Indeed, "[i]f double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Neither English common law nor the Double Jeopardy Clause at the time of its adoption would abide this unfairness, yet somehow this Court's 20th- and 21st-century jurisprudence does.

2. In the same vein, the separate-sovereigns exception turns the liberty-preserving purpose of

federalism on its head. Our system of federalism was designed as a "double security . . . to the rights of the people." The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). But under the separate-sovereigns exception these two levels of government do precisely the opposite—eviscerate individual rights—by accomplishing together what neither can separately. This is an especially unwarranted result in a system where the states and federal government are not foreign nations, but "parts of ONE WHOLE." Federalist No. 82, at 493 (Alexander Hamilton).

II. *Stare decisis* concerns should not keep the Court from overruling the separate-sovereigns exception.

A. The separate-sovereigns exception was egregiously wrong from the start, in ways that lend it less precedential force. The separate-sovereigns exception originated in ill-considered dicta and solidified through a series of decisions that ignored prior precedents and never meaningfully engaged with the text or original meaning of the Double Jeopardy Clause. *Bartkus* and *Abbate* were decided by the narrowest of margins over spirited dissents. And the separate-sovereigns exception has long been questioned by members of this Court, lower-court jurists, and legal scholars.

B. *Stare decisis* loses its force when a decision's doctrinal underpinnings have been eroded. That is indisputably the case here. The separate-sovereigns exception developed on the understanding that the Double Jeopardy Clause did not apply to the states, and has not been re-visited since the Court held to

the contrary. Incorporation eliminated the separate-sovereigns exception's doctrinal justification. The Court has repeatedly held in nearly identical contexts that incorporation justifies overruling precedents premised on a provision's inapplicability to the states. In *Elkins v. United States*, 364 U.S. 206 (1960), the Court overruled the so-called "silver platter" doctrine, which had allowed federal prosecutors to use evidence unlawfully obtained by state officers. And in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court overruled its prior holding that one sovereign could, in convicting a defendant, rely on testimony unlawfully compelled by another. Both decisions reflect the unassailable principle that, following incorporation, the Court should not adhere to precedent allowing coordinate governments to accomplish together what neither could do alone. That principle applies with equal force here.

C. Foundational changes in the factual landscape can also justify departing from *stare decisis*. The dramatic federalization of criminal law over the past 60 years is such a foundational change. It has rendered almost laughable another pillar undergirding the separate-sovereigns exception: the assumption that state and federal jurisdiction will only rarely overlap.

D. The separate-sovereigns exception is also unworkable. Even the federal government acknowledges that some check on successive prosecutions by separate sovereigns is required to protect against unfairness. For decades, that check has been the Department of Justice's so-called *Petite* policy. But a prosecutor's secretive application of a

discretionary policy is no substitute for judicial enforcement of a mandatory constitutional right.

E. Finally, no reliance interests justify retaining the separate-sovereigns exception. No property rights hinge on its continued existence. And vindicating the text, purpose, and original meaning of the Double Jeopardy Clause will not unduly impede law-enforcement efforts. Many states already reject the separate-sovereigns exception as a matter of state law, yet no chaos has ensued. Indeed, under this Court's demanding *Blockburger* test for deeming two crimes to be the "same offence" within the meaning of the Double Jeopardy Clause, it will be the unusual case in which federal and state governments may not both bring some charges. And where crimes are in fact the "same offence," federal and state prosecutors can coordinate their prosecution efforts, as they already frequently do.

ARGUMENT

I. THE SEPARATE-SOVEREIGNS EXCEPTION CONTRAVENES THE TEXT, ORIGINAL MEANING, AND PURPOSE OF THE DOUBLE JEOPARDY CLAUSE.

A. The Text of the Double Jeopardy Clause Contains No Exception for Separate Sovereigns.

The Double Jeopardy Clause provides, in absolute terms, that no person shall be "twice put in jeopardy" "for the same offence." U.S. Const. amend. V. The text admits of no exceptions: If two offences are "the same," the Clause forbids successive prosecutions.

As this Court has long held, two crimes are the "same offence" if their elements are the same. That is,

whether "two distinct statutory provisions" are "two offenses or only one" depends simply on "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The words "same offence" cannot be understood to exclude crimes with the same elements simply because they are prosecuted by two different sovereigns.

It would have been a simple matter to write such an exception into the Double Jeopardy Clause. A few additional words would have done the trick. In fact, one member of the first Congress proposed language to do just that. The original draft of the Double Jeopardy Clause prohibited "more than one trial or one punishment for the same offence." 1 Annals of Cong. 753 (1789). Representative George Partridge suggested adding, after "same offence," the words "by any law of the United States." *Id.* Partridge's proposal would have permitted the federal government to prosecute a defendant after conviction for the same offense under state law or any law other than a "law of the United States." *Id.* Yet Congress *rejected* the Partridge amendment, instead choosing a Double Jeopardy Clause phrased in absolute terms. *Id.* As Congress's rejection of the Partridge amendment confirms, those absolute terms admit of no exceptions.

B. The Separate-Sovereigns Exception Is at War with the Original Meaning of the Double Jeopardy Clause.

Not only is the separate-sovereigns exception irreconcilable with the text of the Double Jeopardy Clause, it also departs sharply from the original

understanding of the Clause, rendering the Clause *less* protective of individual liberty than it was in 1791. The framers of the Bill of Rights well understood that the Double Jeopardy Clause reflected the English common law rule. English common law courts forbade successive prosecutions by separate sovereigns long before the American founding. And early American practice reflected the English rule, all through the years of Chief Justice John Marshall. Not until the time of Chief Justice Roger Taney did the Court ever hint that the Constitution might permit successive prosecutions by different sovereigns for the same crime. Not until 1922, moreover, did the Court hold—without any consideration of historical evidence—that the federal government could prosecute a defendant after a state had already convicted him for the same offense. In short, the separate-sovereigns exception is irreconcilable with overwhelming evidence of the Double Jeopardy Clause's original meaning.

1. The Framers Understood the Double Jeopardy Clause to Incorporate the English Common Law Rule Prohibiting Successive Prosecutions by Separate Sovereigns.

a. The framers understood the Double Jeopardy Clause generally to embody an established principle of English common law. During debates in the first Congress, one representative voiced the uncontroversial point that the Clause is "declaratory of the law as it now stood" and consistent with "the universal practice in Great Britain, and in this country." 1 Annals of Congress 753 (1789) (remarks of Rep. Livermore). The prohibition against double

jeopardy was thus understood as "another great privilege secured by the common law" of England and incorporated into the Constitution of the United States. 3 Joseph Story, Commentaries on the Constitution of the United States 662 (1833).

This Court has since confirmed that the Double Jeopardy Clause is derived from English "common law, . . . carried into the jurisprudence of this Country through the medium of Blackstone." *Benton v. Maryland*, 395 U.S. 784, 795 (1969). To determine the original scope of the Double Jeopardy Clause, the Court must therefore look to the "English practice, as understood in 1791." *Grady v. Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting), *overruled by United States v. Dixon*, 509 U.S. 688 (1993); *see Ex parte Lange*, 85 U.S. 163, 170 (1873) (the Double Jeopardy Clause protects against successive prosecutions "so far as the common law gave that protection").

b. For centuries, English law followed the ancient and "universal maxim" "that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 335 (5th ed. 1773) (hereinafter Commentaries). This principle was embodied in several pleas, two of which are relevant here: *autrefois acquit* (former acquittal), and *autrefois convict* (former conviction). *Id.* at 335–36. In a proper case, a defendant could enter one of these pleas to bar a second prosecution in the same or different court. *Id.*

At the time of the American founding, English law had specifically and squarely rejected the idea that

two sovereigns could punish a defendant for the same crime. *See* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1 (1956). Indeed, English courts repeatedly held that prosecution in a foreign country would bar a second prosecution for the same crime in England. And English treatises universally confirmed that rule.

i. The most instructive case is *King v. Roche*, (1775) 168 Eng. Rep. 169, 169 (K.B.). There, an English prosecutor sought to convict Roche for a murder committed in South Africa. *Id.* Roche "pleaded *Autrefois acquit*," asserting that a Dutch court had previously acquitted him of the same murder. *Id.* The court agreed that a prior acquittal would bar prosecution in England because "a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction." *Id.* at cmt. a. For perfect clarity, the court explained that "if A., having killed a person in Spain, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in Spain in bar." *Id.*

Roche relied on the oft-cited *King v. Hutchinson*. There, a Portuguese court acquitted Hutchinson of a murder committed in Portugal. *Roche*, 168 Eng. Rep. at 169 cmt. a. He was later prosecuted again in England, "the King being very willing to have him tried here for the same offence." *Id.* The court held that, "as he had been already acquitted of the charge by the law of Portugal, he could not be tried again for it in England." *Id.* Though there is no surviving direct report of *Hutchinson*, at least three reported cases in addition to *Roche* cite that decision as

settling English law on the separate-sovereigns issue. *See Beak v. Tyrrell*, (1688) 89 Eng. Rep. 411, 411 (K.B.), *sub nom Beak v. Thyrwhit*, 87 Eng. Rep. 124; *Burrows v. Jemino*, (1726) 25 Eng. Rep. 235 (Ch.), *sub nom Burroughs v. Jamineau*, 93 Eng. Rep. 815; *Gage v. Bulkeley*, (1744) 27 Eng. Rep. 824, 826–27 (K.B.).

Hutchinson itself reflects the rule of an even earlier case, *King v. Thomas*, 1 Lev. 118 ((1664) 83 Eng. Rep. 326 (K.B.)); 1 Keble 663; 1 Sid. 179, (1662) 82 Eng. Rep. 1043 (K.B.). In *Thomas*, the King's Bench held that a previous acquittal in Wales would bar prosecution in England. *Id.* As one reporter stated it: "*Auterfoits acquit in les marches de Gales est bone plea icy in Angleterre.*" 1 Sid. 179. This was because the Welsh were "to have the same immunities as English born, who on acquittal cannot be tried again." 1 Keble 663, 664.

This traditional rule—dating at least to 1662—remained the same into the 20th century. *King v. Aughet*, 13 Cr. App. R. 101 (C.C.A. 1918). *See* Grant, *Successive Prosecutions*, *supra* at 8–12 (discussing the English cases); J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1318–20 (1932) (same).

ii. English treatises uniformly reflected the well-known *Hutchinson* rule. Blackstone, for example, explained that an acquittal "before any court having competent jurisdiction" would bar a second prosecution in England. Commentaries at 335 & cmt. j. For the proposition that "any court having competent jurisdiction" included courts of a separate sovereign, Blackstone cited *Beak v.*

Thyrwhit, which itself cited *Hutchinson* for the settled traditional rule. *Id.* Blackstone, of course, was considered by the founders to be "the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904); *see also Benton*, 395 U.S. at 795.

Other treatises from before and after the American founding followed suit: "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." L. MacNally, The Rules of Evidence on Pleas of the Crown 428 (1802); *accord* 1 T. Starkie, A Treatise on Criminal Pleading 301 n.h (1814); 1 J. Chitty, A Practical Treatise on the Criminal Law 458 (1816); F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius 245 (5th ed. 1788); 2 W. Hawkins, A Treatise of the Pleas of the Crown 372 (1739). Professor Grant's well-known article cites 20 English treatises published between 1724 and 1965, all restating the *Hutchinson* rule. Grant, *Successive Prosecutions* at 10 n.36. Without question, then, a prior conviction or acquittal by a separate sovereign would bar a second prosecution in England.

2. Early American Cases and Treatises Reflect the *Hutchinson* Rule.

a. Throughout the Marshall years, this Court accepted the traditional *Hutchinson* rule as an established background principle. The leading case is *Houston v. Moore*, 18 U.S. 1 (1820). There, the Court held that state and federal courts had concurrent jurisdiction to prosecute a defendant for deserting the militia. *Id.* at 14. Resisting that conclusion, the defendant argued that concurrent

state and federal jurisdiction "might subject the accused to be twice tried for the same offence." *Id.* at 31. The Court rejected this argument with a straightforward statement of the traditional rule: "[I]f the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.*

Justice Story dissented in *Houston* based on his view that the state lacked concurrent jurisdiction. *Id.* at 20. But his dissent only reinforces the *Hutchinson* rule. Concurrent jurisdiction must be wrong, he argued, because it would mean either that an initial state conviction would oust the federal government of jurisdiction (a result he could not abide), "or that the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government." *Id.* at 30. Thus, while the majority and dissent disagreed over concurrent jurisdiction, both thought it beyond question that separate sovereigns could not prosecute a defendant for the same crime.

Two weeks after deciding *Houston*, this Court again unanimously endorsed the *Hutchinson* rule in *United States v. Furlong*, 18 U.S. 184 (1820). The case involved an Irish defendant who had been tried in federal court for both piracy and the murder of an English victim on an English ship. *Id.* at 194. The Court explained that when multiple sovereigns hold concurrent jurisdiction over an offense "the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Id.* at 197.

Thus, in two clear-cut cases, the Marshall Court embraced the firmly rooted traditional rule against double prosecutions by separate sovereigns.

b. Nearly every state court followed the traditional rule as well, both before ratification of the Fifth Amendment and in the decades afterward. In one early case, the defendant stole a horse in the Ohio Territory and took it to North Carolina, where he was prosecuted. *Brown*, 2 N.C. at 100. The court barred the prosecution based on its concern about successive prosecutions in multiple jurisdictions. It is "against natural justice," the court said, for a defendant to be "cropped in one" state, "branded and whipped in another, imprisoned in a third, and hanged in a fourth; and all for one and the same offence." *Id.* at 101.

In several other state cases, the double-jeopardy issue arose in the context of the pressing issue of the day: disputes over concurrent federal and state jurisdiction. These state courts reassured defendants that concurrent jurisdiction could not possibly lead to successive state and federal prosecutions for the same offence. The problem is more "imaginary than real," said the Supreme Court of Vermont, because "a decision in one court will bar any farther prosecution for the same offence, in that or any other court." *State v. Randall*, 2 Aik. 89, 100–01 (Vt. 1827).

Perhaps the best example is *State v. Antonio*, 2 Tread. 776, 781 (S.C. 1816), a case decided by South Carolina's Constitutional Court (its highest court at the time for cases at law). *Antonio* held that the state had concurrent jurisdiction with the federal government to punish counterfeiting. Though the

case produced three opinions regarding this issue, all agreed that double-jeopardy principles would bar successive prosecutions by the state and federal government. *The majority*: The established practice among foreign nations is "to discharge one accused of a crime, who has been tried by a court of competent jurisdiction," and if that practice "prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties?" *Id.* *The concurrence*: If federal and state courts possess concurrent criminal jurisdiction then both courts must "allow of the plea of *autrefois acquit*, which will be a good bar to a second prosecution, because a determination in a court having competent jurisdiction, must be final and conclusive on all courts of concurrent jurisdiction." *Id.* at 788. *The dissent*: Prosecution by both the federal government and a state government "is not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice." *Id.* at 804.

Again and again for decades, state courts reassured defendants that concurrent state and federal jurisdiction would pose no double-jeopardy problem because prosecution by one sovereign would bar a second prosecution by another. A Massachusetts court stated that "the delinquent cannot be tried and punished twice for the same offence" by different sovereigns because only the first court to "exercise[] jurisdiction has the right to enforce it by trial and judgment." *Commonwealth v. Fuller*, 49 Mass. 313, 317–18 (1844). A Michigan court stated that a state "conviction would be admitted in federal courts as a bar" to a subsequent

federal prosecution for the same offense. *Harlan v. People*, 1 Doug. 207, 212 (Mich. 1843). And a Missouri court simply rejected concurrent jurisdiction to punish counterfeiting, with analysis based on the premise that a defendant could "plead [a state] conviction in bar" to a second federal prosecution. *Mattison v. State*, 3 Mo. 421, 426 (1834). Even when dissenters disagreed about concurrent jurisdiction, they emphatically agreed that a state conviction would "bar any other or further prosecution for the same offense, by the same or any other power, and may be so pleaded" in accordance with the Double Jeopardy Clause, the "law of nations," and "the law in separate States." *Id.* at 433 (Wash, J. dissenting); *see also People ex rel. McMahon v. Sheriff*, 2 Edm. Sel. Cas. 324, 343 (N.Y. Sup. Ct. 1852) ("nor is it unusual, where the United States and the State courts have concurrent jurisdiction, for them to allow a judgment rendered in one to be a bar to the recovery of a judgment in the other").

Against this overwhelming weight of state authority, research reveals just one outlier, *Hendrick v. Commonwealth*, 32 Va. 707 (1834). The defendant in *Hendrick* argued that a Virginia prosecution for check forgery at the Bank of the United States could lead to a second federal prosecution for the same forgery, so "that a person might be punished twice for the same offence." *Id.* at 713. Without supporting authority, the court responded that "the law of *Virginia* punishes the forgery, not because it is an offence against the *U. States*, but because it is an offence against this commonwealth." *Id.* Among all reported state cases decided before or in the several decades after the founding, this lone sentence is the

only suggestion that the same crime could be punished under both state and federal law.

c. Treatises on American law uniformly reported the settled traditional rule. Some widely read treatises cited the English cases—particularly *Hutchinson* and *Beak*—and explained that an "acquittal in any court whatsoever of competent jurisdiction . . . will be sufficient to preclude any subsequent proceedings before every other court." Francis Wharton, A Treatise on the Criminal Law of the United States 137 (1846); *accord* Francis Wharton, A Treatise on the Law of Homicide in the United States 283 (1855). Others cited this Court's decision in *Houston v. Moore* for the same principle: "Where the jurisdiction of the United States court and of a state court is concurrent, the sentence of either court, whether of conviction or acquittal, may be pleaded in bar to a prosecution in the other." Thomas Sergeant, Constitutional Law 278 (2d ed. 1830); *accord* William Rawle, A View of the Constitution of the United States of America 191 (1825); 1 James Kent, Commentaries on American Law 374 (1826).

3. The Separate-Sovereigns Exception Developed in Dicta, Long after the Founding.

a. Not until the Taney Court did the separate-sovereigns exception develop, and at first only in dicta. In three concurrent-powers cases between 1847 and 1852, the Court began to suggest that the Double Jeopardy Clause would not bar successive prosecutions by state and federal governments. The foundation stone of the Court's reasoning in each case

was that the Double Jeopardy Clause did not apply to the states.

The first was *Fox v. Ohio*, 46 U.S. 410, 432 (1847). There, the State of Ohio prosecuted a defendant for counterfeiting money. The Court upheld the conviction, holding that that the federal government did not have exclusive power to criminalize counterfeiting. In a familiar argument, the defendant pointed out that concurrent jurisdiction could potentially result in two prosecutions for the same offense. *Id.* at 434. Without fully responding to the dual-prosecution problem, the Court reasoned that it would not use the Bill of Rights as a weapon against the states to limit their substantive authority to punish crimes. *Id.* at 434–35. Citing *Barron v. City of Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights did not apply to state governments, the Court deemed it unlikely "that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority." *Id.* at 435.

The Court confronted a federal prosecution for counterfeiting in *United States v. Marigold*, 50 U.S. 560 (1850). Taking the opposite tack of the defendant in *Fox*, this defendant argued that the *states* had exclusive jurisdiction over counterfeiting. *Id.* at 563. Rejecting that argument, the Court held that the federal and state governments hold concurrent jurisdiction to punish counterfeiting. *Id.* at 570. As for the still hypothetical dual-prosecutions problem, the Court stated that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its

commission the penalties denounced by either, as appropriate to its character in reference to each." *Id.* at 569. While this dictum edged closer to the separate-sovereigns exception, the Court still said only that *either* the state or federal government could prosecute the crime. It did not say *both* could do so.

It was in a fugitive-slave case that the Court first offered a full-throated rejection of the original meaning of the Double Jeopardy Clause. In *Moore v. Illinois*, 55 U.S. at 17, an Illinois court convicted the defendant of harboring a fugitive slave, and the defendant claimed that a federal statute preempted the Illinois law. In support, the defendant argued that the federal government could potentially prosecute him for the same offense. *Id.* at 19. The Court first explained that the state crime and federal crime were not the same offense because they contained distinct elements. *Id.* In the alternative, it provided the separate-sovereigns rationale. "The same act," the Court said, "may be an offence or transgression of the laws of both" the state and federal governments. *Id.* at 20. When both sovereigns separately punish the offender, it means only that "he has committed two offences." *Id.* "He could not plead the punishment by one in bar to a conviction by the other." *Id.* The Court cited only *Fox* and *Marigold* for this analysis. It said nothing of *Houston* or *Furlong*. It said nothing of the widely known, traditional English rule. And it said nothing of why the framers would have rejected that traditional rule *sub silentio*. Justice McLean dissented: "[N]o government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to

a great principle of action, sanctioned by humanity and justice." 55 U.S. at 22.

b. While the Taney Court sowed the seeds of the separate-sovereigns exception, not until the Prohibition Era did the doctrine take root as a holding. This Court first upheld a successive federal prosecution after a state prosecution for the same crime in *Lanza*, 260 U.S. at 382–84. The *Lanza* defendants were convicted in Washington state court of illegally manufacturing and transporting liquor, and were later charged with the same crime in federal court. They argued that the Double Jeopardy Clause barred the federal prosecution. *Id.* at 379. The Court held that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.* at 382.

Despite that the Double Jeopardy Clause was understood to reflect the English common law rule, the Court reached this result without so much as mentioning the traditional English rule, the adoption of that rule in the Double Jeopardy Clause, or the acceptance of that rule in *Houston*, 18 U.S. at 13, and *Furlong*, 18 U.S. at 197. Rather than inquiring into the meaning of the Constitution, the Court focused on the policy concern that a bar against successive state and federal prosecutions might permit states to frustrate national prohibition. *Lanza*, 260 U.S. at 385. And *Barron v. City of Baltimore* supplied the key legal rationale for the Court's holding. Because the Fifth Amendment "applies only to proceedings by the federal government," the Court explained, the Double Jeopardy Clause prohibits only "a second prosecution under authority of the Federal

Government after a first trial for the same offense under the same authority." *Id.* at 382.

c. The separate-sovereigns exception metastasized further in a pair of cases—***Bartkus***, 359 U.S. 121, and ***Abbate***, 359 U.S. 187—decided ten years before this Court held in ***Benton***, 395 U.S. at 787, that the Fourteenth Amendment incorporated the Double Jeopardy Clause against the states.

The primary battle played out in *Bartkus*, a five-to-four decision that upheld a state prosecution after a federal acquittal for the same bank robbery. At great length, the Court explained that the Double Jeopardy Clause had not been incorporated into the Due Process Clause of the Fourteenth Amendment. 359 U.S. at 124–28. The Court therefore applied principles of due process, rather than seeking to ascertain the meaning of the Double Jeopardy Clause itself. *Id.* The Court also relied on the line of cases beginning with *Fox*, 46 U.S. at 432, which again rested on the theory that the Double Jeopardy Clause applied only to the federal government. 359 U.S. at 129.

Not only was *Bartkus* a due process case, but the Court made two crucial errors that undermined its holding from the outset.

First, the Court refused to even "consider" English cases as "relevant." *Id.* at 128 n.9. It based this conclusion in part on the "confused and inadequate reporting" of *Hutchinson*, notwithstanding that every English case cited in *Bartkus* uniformly states the *Hutchinson* rule against successive foreign prosecutions. *Id.* And *Bartkus* does not even cite *Roche*, which cannot conceivably be subject to

criticism based on confused reporting because it exists in only one reported version and contains a pellucid explication of the *Hutchinson* rule. *See supra* at 13. Nor does *Bartkus* offer any example of a material difference in the various English reports of *Hutchinson*—because there is none. Regardless, for purposes of determining the original meaning of the Double Jeopardy Clause, the crucial question is not what actually happened in *Hutchinson*, but whether the English common law was understood to bar successive prosecutions by different sovereigns. Based on the reported English cases, Blackstone's Commentaries (which the *Bartkus* majority does not even cite), and every other relevant English treatise, it would have been abundantly clear to the founding generation that English law did bar such prosecutions.

Second, *Bartkus* misinterpreted *Houston*, 18 U.S. at 1. According to *Bartkus*, the majority in *Houston* was speaking only to circumstances in which a "state statute impose[s] state sanctions for violation of a federal criminal law," not those in which a state imposes sanctions for a violation of its own criminal law. 359 U.S. at 130. That is not the best reading of *Houston*. The Pennsylvania statute at issue in *Houston* prohibited desertion from the militia, and it was worded similarly to a federal statute also prohibiting desertion. But Pennsylvania was enforcing its own desertion statute, not the federal one. *Houston*, 18 U.S. at 12. True, the opinion in *Houston* states that the purpose of the Pennsylvania statute was "to confer authority upon a State Court Martial to enforce the laws of the United States against delinquent militia men." *Id.* at 28. But the

Court did not literally mean that Pennsylvania was enforcing a federal statute; it meant instead that Pennsylvania—by enacting its own criminal statute as a "re-enactment of the acts of Congress"—was adding its enforcement efforts to those of the federal government. *Id.* At any rate, even if *Houston* were inconclusive, the other evidence of original meaning is perfectly clear.

On the same day it decided *Bartkus*, the Court also decided *Abbate*, a six-to-three decision upholding a federal prosecution after a state conviction for the same act of destroying telecommunications equipment. 359 U.S. at 190. Like *Bartkus*, *Abbate* relied on *Fox*, *Lanza*, and the argument that the Double Jeopardy Clause had not been incorporated against the states. *Id.* The Court concluded that "[n]o consideration or persuasive reason not presented to the Court" in *Lanza* "is advanced why we should depart from its firmly established principle." *Id.* at 195. Rather than look to the meaning of the Double Jeopardy Clause itself, the Court simply pointed to the "undesirable consequences" that "would follow if *Lanza* were overruled"—namely, that "federal law enforcement must necessarily be hindered." *Id.* As in *Bartkus*, the majority opinion did not cite any historical evidence of the Clause's original meaning.

Justice Black (joined by the Chief Justice and Justice Douglas) dissented in both *Bartkus* and *Abbate*. None of the Court's reasons, he explained, justified a departure from the traditional rule that barred successive prosecutions by different sovereigns. *See* 359 U.S. at 150–64; 359 U.S. at 201–04. Justice Black cited the overwhelming evidence of

original meaning. *See* 359 U.S. at 156 n.15. He showed that the majority mischaracterized the many state cases decided in the decades after the founding—the overwhelming majority of which affirmed the traditional rule. *See id.* at 158–59. And, as discussed below, he explained that the separate-sovereigns exception misuses federalism to trample individual rights. *See id.* at 155.

C. The Separate-Sovereigns Exception Conflicts With the Purpose of the Double Jeopardy Clause and With Core Principles of Federalism.

1. The separate-sovereigns exception seriously undermines the purpose of the Double Jeopardy Clause. "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," with roots in Greek and Roman law. *Bartkus*, 359 U.S. at 151 (Black, J., dissenting). At its core, the Clause protects against that ancient abuse of governmental power. In doing so it embodies a principle of fundamental fairness—a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187–88 (1957).

Permitting consecutive prosecutions for the same offense simply because different sovereigns initiate

those prosecutions "hardly serves" the deeply rooted principles of finality and fairness the Clause was designed to protect. *Sanches Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring). After all, "[l]ooked at from the standpoint of the individual," the notion that "a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State" is "too subtle . . . to grasp." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). "If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Id.* "It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

These concerns are far from theoretical. The separate-sovereigns exception forces defendants like Gamble—who have already been convicted or acquitted of an offense—to " 'run the gauntlet' a second time." *Abney v. United States*, 431 U.S. 651, 662 (1977). And Gamble is far from the only one who has suffered that fate. Justice Black's dissent in *Bartkus* noted multiple examples of "a conviction following acquittal." 359 U.S. at 163. And this Court's own cases provide many other examples of successive prosecutions, such as the defendant in *Heath v. Alabama*, 474 U.S. 82, 84–85 (1985), who was tried in Georgia and sentenced to life in prison, then tried again in Alabama and sentenced to death—all for the same crime. Indeed, the exception

would permit a defendant *acquitted* in federal court to be convicted and sentenced to death by a state for the same crime. These results are intolerable—"contrary to the [very] spirit of our free country." *Bartkus*, 359 U.S. at 150 (Black, J. dissenting). Neither English common law nor the Double Jeopardy Clause at the time of the founding would abide this unfairness, yet somehow this Court's 20th- and 21st-century jurisprudence does.

To make matters worse, "the victims of such double prosecutions" will most often be those who are least prepared to handle the ordeal—"the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again." *Bartkus*, 359 U.S. at 163 (Black, J., dissenting). It is precisely this kind of harassment that the Double Jeopardy Clause was designed to prevent.

2. The separate-sovereigns exception also runs afoul of foundational concepts of federalism. The division of power "between two distinct governments"—state and federal—was designed to afford a "double security . . . to the rights of the people." Federalist No. 51, *supra* at 323. Federalism, in other words, was supposed to protect liberty, not destroy it. *See Bond v. United States*, 564 U.S. 211, 220–21 (2011). The Court should therefore be "suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards" of individual liberty. *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

The separate-sovereigns exception turns federalism on its head. The mechanism through

which federalism enhances liberty was, to the founders, straightforward: "The different governments will control each other, at the same time that each will be controlled by itself." Federalist No. 51, *supra*, at 323. Under the separate-sovereigns exception, however, federalism does precisely the opposite: It permits different governments "to do together what . . . neither can do separately"—all to the detriment of individual liberty. *Abbate*, 359 U.S. at 203 (Black, J., dissenting). This liberty-destroying version of federalism "is a misuse and desecration of the concept." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

The exception is especially unwarranted because the states, unlike foreign nations, are not independent sovereigns under the Constitution. The states and federal government are "kindred systems," and "parts of ONE WHOLE." Federalist No. 82, *supra*, at 493 (Alexander Hamilton). It is one thing to reject the English rule and permit successive prosecutions after a foreign acquittal. It is quite another to permit successive prosecutions after an acquittal by a coordinate government that is part of the same national system. And it is all the worse to allow this in the name of sovereignty: Our federal and state sovereigns—so "intimately bound by political ties"—should respect the criminal judgments of one another at least as much as "nations who [we]re strangers to each other" did at the time of the founding. *Antonio*, 2 Tread. at 781.

II. *STARE DECISIS* SHOULD NOT PREVENT THIS COURT FROM VINDICATING THE FUNDAMENTAL CONSTITUTIONAL RIGHT NOT TO BE HELD TWICE IN JEOPARDY FOR THE SAME OFFENSE.

Stare decisis is not an "inexorable command." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). To the contrary, this Court has always been willing to overrule bad precedent in certain, well-defined circumstances. *See, e.g.*, Jonathan H. Adler, *The Stare Decisis Court?* (July 8, 2018), *available at* https://reason.com/volokh/2018/07/08/the-stare-decisis-court (collecting data showing that the Court regularly overturns precedent, though the Roberts Court has done so at a lower rate than its predecessors). That is particularly true in cases of constitutional interpretation, where the force of *stare decisis* "is at its weakest." *Agostini*, 521 U.S. at 235; *see also Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (explaining that *stare decisis* is stronger in the statutory context because, in statutory cases, "critics of [this Court's] ruling[s] can take their objections across the street, and Congress can correct any mistake it sees").

This case exemplifies nearly all of the traditional justifications for overruling an erroneous precedent. The separate-sovereigns exception developed without any thorough consideration of constitutional text and original meaning. It was built on a jurisprudential foundation that crumbled when the Double Jeopardy Clause was incorporated against the states. It is the product of a bygone era in which federal law rarely criminalized conduct punishable under state law. It

produces unfair and unworkable results. And it implicates no reliance interests. For any and all of these reasons, ***stare decisis*** should not prevent this Court from overruling the separate-sovereigns exception.

A. The Separate-Sovereigns Exception Was Egregiously Wrong from Its Inception.

It goes without saying that "[a]n important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus v. Am. Fed'n of State, Cty., & Mun. Emp.*, 138 S. Ct. 2448, 2479 (2018). The separate-sovereigns exception is wrong in precisely the ways this Court has recognized render a precedent less deserving of *stare decisis* protection.

First, this Court has recognized (in the double-jeopardy context, no less) that a precedent is ripe for overruling when it "contradict[s] an 'unbroken line of decisions,' [and] contain[s] 'less than accurate' historical analysis." *United States v. Dixon*, 509 U.S. 688, 711–12 (1993) (quoting *Solorio v. United States*, 483 U.S. 435, 439, 442 (1987)). The separate-sovereigns exception certainly fits that bill. The doctrine had its origins in ill-considered dicta, much of it driven by concerns over fugitive slaves. *See supra* Part I.B.3.a. And it solidified through a series of decisions that involved other constitutional provisions, ignored prior precedents, and never meaningfully engaged with the text or original meaning of the Double Jeopardy Clause. *See supra* Part I.B.3.b–c. Indeed, the Court in *Lanza* did not even have the original-meaning evidence before it—so did not consider the traditional English rule or

this Court's early acceptance thereof. And neither *Lanza*, nor the majority opinions in *Bartkus* and *Abbate*, so much as cited Blackstone's Commentaries. *See supra* Part I.B.3.b.

Second, *stare decisis* carries less weight for cases "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." *Payne*, 501 U.S. at 828–29. That description fits *Bartkus* and *Abbate* to a T. *See supra* Part I.B.3.c. *Bartkus* was five-to-four, and the follow-on decision in *Abbate* garnered only one additional vote. Justice Black's opinions in those cases (particularly *Bartkus*) were ones for the ages, well deserving of a place in the pantheon of dissents that later become law.

Finally, incorrect decisions merit reconsideration when "[t]hey have been questioned by Members of the Court in later decisions," *Payne*, 501 U.S. at 829–30, or otherwise subjected to "substantial and continuing" criticism, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). Three Terms ago, in *Sanchez Valle*, 136 S. Ct. 1863, Justices Ginsburg and Thomas called for "fresh examination" of the separate-sovereigns exception "in an appropriate case." *Id.* at 1877 (Ginsburg, J., dissenting). In so doing, they added their voices to those of Justice Black and the other *Bartkus* dissenters, as well as to an ever-growing chorus of respected lower-court jurists[1] and legal

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[1] *See, e.g.*, *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J.) (arguing that "the entire dual sovereignty doctrine is in need of serious reconsideration"); *United States v. Grimes*, 641 F.2d 96, 104 (3d Cir. 1981) ("Although developments in the application of the Bill

scholars[2] who have long criticized the exception, often in the harshest terms. Indeed, far from

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(continued...)

of Rights to the states, consequent alterations in the system of dual sovereignty, and the historic idiosyncracies of various of the precedents upon which *Bartkus* relies may deprive the opinion of much of its force, we do not believe we are the proper forum to overturn a legal directive from the Supreme Court."); *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999) ("[W]e and other Courts of Appeal have suggested that the growth of federal criminal law has created a need for the Supreme Court to reconsider the application of the dual sovereignty rule to situations such as this.").

[2] *See, e.g.*, 6 W. LaFave, J. Israel, N. King, & O. Kerr, CRIMINAL PROCEDURE § 25.5(a), 851 (4th ed. 2015) (citing various criticisms of the separate-sovereigns exception); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1 (1995); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); James E. King, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961); Thomas Franck, *An International Lawyer Looks at the* Bartkus *Rule*, 34 N.Y.U. L. REV. 1096 (1959); Grant, *Successive Prosecutions*, *supra*; Grant, *The* Lanza *Rule*, *supra*.

engendering "sustained and widespread debate" or "national controvers[y]," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992), the separate-sovereigns exception is as uniformly criticized a rule of constitutional law as any. Even within legal academia—which tends to reward unconventional viewpoints—defenders of the exception are nowhere to be found.

B. Incorporation of the Double Jeopardy Clause Against the States Eviscerated the Core Doctrinal Premise of the Separate-Sovereigns Exception.

Separately, *stare decisis* loses its force where "subsequent decisions of this Court" have "eroded" a decision's doctrinal "underpinnings." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). "[W]here there has been a significant change in, or subsequent development of, our constitutional law," this Court has not hesitated to update old doctrines to cohere with the new legal landscape. *Agostini*, 521 U.S. at 235–36; *see also, e.g., Alabama v. Smith*, 490 U.S. 794, 803 (1989) (explaining that a "later development of . . . constitutional law" is a basis for overruling a decision); *Casey*, 505 U.S. at 857 (observing that overruling precedent is proper when "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking").

The separate-sovereigns exception developed on the understanding that the Double Jeopardy Clause, like the other provisions of the Bill of Rights, simply did not apply to the states. When this Court incorporated the Double Jeopardy Clause against the

states in 1969, the exception became unmoored from its only doctrinal anchor. This Court has repeatedly held, in nearly identical contexts, that incorporation is precisely the kind of jurisprudential sea change that justifies a departure from *stare decisis*. It should do so again here.

1. In the beginning, the Bill of Rights did not apply to the states. *See Barron v. Baltimore*, 32 U.S. 243, 247 (1833) ("The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."). Accordingly, absent an applicable state-law provision, nothing prevented states from effecting the very deprivations of liberty the Constitution forbade the federal government from accomplishing. Indeed, as early as 1833 this Court recognized that the Fifth Amendment, specifically, did not impose any limitations on state actors. *See id.* ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."). Although many states barred successive prosecutions as a matter of state law, *see supra* at Part I.B.2.b, the federal Double Jeopardy Clause carried no import for state prosecutions.

This Court explicitly relied on this principle when it first suggested in *Fox* that successive prosecutions by separate sovereigns might be permissible. *Fox* cited *Barron* for the proposition that the Fifth Amendment was "intended to prevent interference with the rights of the States." 46 U.S. at 434. The Double Jeopardy Clause did not bar duplicative state and federal convictions, the Court reasoned, because the Clause was "exclusively [a] restriction[ ] upon

federal power." *Id.* "[T]he logic of [*Barron*]" thus "furnished an important justification for the early dual sovereignty doctrine." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 11 (1995).

When, in *Lanza*, the Court first held that the Double Jeopardy Clause permits a successive federal prosecution after a state prosecution for the same crime, it again relied on the logic of *Barron*. The Court reasoned that "[t]he Fifth Amendment . . . applies only to proceedings by the Federal Government," and, therefore, "the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." 260 U.S. at 382. Although *Lanza* post-dated ratification of the Fourteenth Amendment, this Court had yet to hold that passage of that Amendment had incorporated the Double Jeopardy Clause against the states and, indeed, would reject the proposition soon after *Lanza*, in *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

In later declining to overrule *Lanza* in *Bartkus* and *Abbate*, the Court again relied on the absence of any double-jeopardy limitation for the states. As the Court put it in *Bartkus*, "the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments." 359 U.S. at 124. Indeed, that was why the Court's analysis was limited to the scope of the Due Process Clause of the Fourteenth Amendment: Because it was a state conviction under review, the Double Jeopardy Clause—seen then as a restriction only on the federal government—had no

relevance. *See id.* The Court decided *Abbate* on the very same day in reliance on the *Lanza* rationale: "[T]he Fifth Amendment . . . applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is [therefore] a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." 359 U.S. at 194 (quoting *Lanza*, 260 U.S. at 382). The *Abbate* Court did "not write on a clean slate," 359 U.S. at 190; its conclusion was "compelled" by *Lanza*, which it declined to overrule, *id.* at 196. *See also United States v. Grimes*, 641 F.2d 96, 102 (3d Cir. 1981) (questioning "whether successive federal or successive state proceedings can be validly distinguished from successive federal-state proceedings").

2. Ten years after *Bartkus* and *Abbate*, the Double Jeopardy Clause became one of the last Bill of Rights protections to be formally incorporated against the states. *See Benton*, 395 U.S. at 787. "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," the Court held, so it "should apply to the States through the Fourteenth Amendment." *Id.* at 794.

With the Double Jeopardy Clause's "fundamental ideal" now applicable to the states, the primary justification for the separate-sovereigns exception—that is, its "important predicate," *Grimes*, 641 F.2d at 101–02—disappeared. Indeed, the logic of incorporation cannot be reconciled with such an exception: "Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow

the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone." *Id.*

3. This Court has previously recognized that the incorporation of other constitutional provisions justifies overruling precedents premised on those provisions' inapplicability to the states.

For example, in *Elkins*, 364 U.S. 206, the Court reexamined—and ultimately overruled—the so-called "silver platter" doctrine, which provided that federal prosecutors could use evidence unlawfully obtained by state officers. *Id.* at 213. That doctrine was first endorsed by this Court in *Weeks v. United States*, 232 U.S. 383 (1914), which held that the admission of this sort of evidence was permissible because "the Fourth Amendment is not directed to individual misconduct of [local] officials. Its limitations reach the Federal government and its agencies." *Id.* at 398. Following *Weeks*, "the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years." *Elkins*, 364 U.S. at 210.

Then came incorporation. In 1949, this Court held that the Fourth Amendment's protection against unreasonable searches and seizures was "enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949). The "foundation" of the silver-platter doctrine thus "disappeared." *Elkins*, 364 U.S. at 210. Accordingly, when the Court had occasion to reconsider that doctrine in 1960, it did not hesitate to do so. With

the Fourth Amendment's protections now applicable to both sovereigns, the Court found no justification for allowing two coordinate governments to accomplish together what neither could do alone. After all, the Court explained, "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

Similarly, in *Murphy*, 378 U.S. 52, the Court overruled its prior holding that one sovereign could, in convicting a defendant, rely on testimony unlawfully compelled by another. *Id.* at 57. That rule was recognized and developed through a series of decisions issued between 1931 and 1958. *See United States v. Murdock*, 284 U.S. 141 (1931) (holding that the federal government could compel a witness to give testimony which might incriminate him under state law); *Knapp v. Schweitzer*, 357 U.S. 371 (1958) (holding that a state could compel a witness to give testimony which might incriminate him under federal law).

For the Fifth Amendment privilege against self-incrimination, incorporation came in 1964. *See Malloy v. Hogan*, 378 U.S. 1 (1964). The very same day, the Court recognized that incorporation "necessitate[d] a reconsideration" of the separate-sovereigns exception to the privilege against self-incrimination. *Murphy*, 378 U.S. at 57. The purpose of that privilege, the Court recognized, is "defeated when a witness can be whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each." *Id.* at 55 (internal quotation marks omitted). Accordingly, after examining

English precedents the prior cases had neglected, the Court overruled the exception and restored the original meaning of the Fifth Amendment protection.

4. This case is of a piece. The separate-sovereigns exception to the Double Jeopardy Clause—just like the silver-platter doctrine and the privilege exception—made sense, if ever, only in a world where the Bill of Rights did not apply to the states. Incorporation changed the game. The Double Jeopardy Clause now applies to the states, and the separate-sovereigns exception survives only as a remnant of a bygone constitutional era—"the kind of doctrinal dinosaur or legal last-man-standing" against which *stare decisis* carries no force. *Kimble*, 135 S. Ct. at 2411.

Indeed, not only does *stare decisis* permit disavowal of the separate-sovereigns exception, it affirmatively counsels in favor of that result. This case is indistinguishable from *Elkins* or *Murphy*. And *stare decisis*, of course, applies to those precedents too. Just as in *Elkins*, "[t]o the victim it matters not whether his constitutional right has been invaded by a federal . . . or . . . state officer." 364 U.S. at 215. And just as in *Murphy*, the Constitution does not permit the state and federal governments to achieve through cooperation the violation of a "constitutional privilege . . . [that] is applicable to each." 378 U.S. at 55. In the wake of incorporation, the separate-sovereigns exception is nothing more than the last "remnant of abandoned doctrine." *Casey*, 505 U.S. at 855. It should be overruled.

C. The Multiplication of Federal Criminal Law Reversed the Factual Premise of the Separate-Sovereigns Exception.

Just as doctrinal erosion can support a departure from *stare decisis*, so too can tectonic shifts in the factual landscape. Specifically, a precedent loses its force when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. An erroneous precedent "must give way to the 'far-reaching systemic and structural changes' " that render the "earlier error all the more egregious and harmful." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018). The dramatic expansion of federal criminal law in the years since the Court adopted the separate-sovereigns exception is exactly the kind of foundational change that calls for reevaluation of previously settled doctrine.

1. Again, start where the separate-sovereigns exception did: with *Fox*. In indicating that successive prosecutions by separate sovereigns would be permissible, the Court relied on its understanding that such prosecutions would occur only in the most exceptional circumstances:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of

> peculiar enormity, or where the public safety demanded extraordinary rigor.

46 U.S. at 435; *see also Lanza*, 260 U.S. at 383 (block-quoting this rationale).

In that era, the Court had every reason to feel "almost certain" that duplicative state and federal convictions would be exceedingly rare. At the time, the federal and state criminal justice systems operated in almost entirely separate spheres. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138–40 (1995). Criminal law was largely the province of the states, with federal crimes existing only to protect limited and well-defined special federal interests. *See id.* As a result, only in unusual cases would duplicative prosecutions be possible even in theory. And, in practice, because there was "little, if any, official coordination" between state and federal prosecutors, opportunities for mischief and manipulation were limited. Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 205 (2011).

2. No longer. The federal criminal code has since become so bloated that "the federal government has [now] duplicated virtually every major state crime." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997); *see* Brickey, *supra*, 1140–45 (describing the expansion of federal criminal law over time). The Department of Justice last tried to arrive at a precise count of the total number of federal crimes in 1982, and, after a two-year effort, gave up.

See Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920. No one has apparently attempted a manual recount since, but a Twitter feed going by the handle @CrimeADay has been tweeting a federal crime every day since 2014, with no end in sight. *See* https://twitter.com/crimeaday. Strikingly, moreover, even 20 years ago, "[m]ore than 40% of the federal provisions enacted since the Civil War ha[d] been enacted since 1970." Task Force on Federalization of Criminal Law, Am. Bar. Ass'n, The Federalization of Criminal Law (1998). Suffice it to say, the national government's role in criminal enforcement has expanded far beyond what the judicial framers of the separate-sovereigns exception could have possibly imagined.

Given this explosion of federal crimes, nearly every crime can be charged both in state court and in federal court. As a result, "[t]he degree of cooperation between state and federal officials in criminal law enforcement"—and, accordingly, the opportunity for inter-governmental collusion at the expense of individual constitutional rights—"has . . . reached unparalleled levels." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995); *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 31–32 (2011).

3. The state of affairs that the separate-sovereigns exception took as its premise thus no longer exists. "The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for

successive prosecutions" than the *Fox* Court, in its wildest dreams (or nightmares) could have envisaged. Meese, *supra*, at 22. Just look at Gamble. Whereas *Fox* anticipated that duplicative prosecutions would occur only in "instances of peculiar enormity, or where the public safety demanded extraordinary vigor," 46 U.S. at 435, Gamble faced duplicative prosecutions for the most pedestrian of offenses: He was pulled over for a broken headlight and found to be in the possession of a small amount of marijuana and a firearm. Convictions involving "illegal possession of a firearm, usually by a convicted felon," accounted for more than half of the 7,305 federal firearms convictions in fiscal year 2016. *See* United States Sentencing Commission, Overview of Federal Criminal Cases—Fiscal Year 2016 8–9. Far from an "instance[] of peculiar enormity" of the sort that the *Fox* Court suggested might justify successive prosecution, 46 U.S. at 435, Gamble's case is indistinguishable from thousands of others in state and federal courts.

Even if duplicative sentences are ultimately not imposed in many of those cases, the mere possibility of that result works grave harm to defendants. Again, state and federal prosecutors routinely coordinate where their jurisdictions overlap. *See All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499. And even when they do not both proceed on the same charge, the mere threat of doing so gives them further leverage to extort pleas from defendants.

This Court has previously recognized that the expansion of federal criminal law—and the opportunities for collusion that expansion entails—justifies overruling precedent founded on the

assumption that the overlap between state and federal criminal law would remain minimal. Again, *Elkins* and *Murphy* are illustrative. In *Elkins*, the Court emphasized that, at the time the silver-platter doctrine was first adopted, the fact "[t]hat such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction could not, perhaps, have been foreseen." 364 U.S. at 211. And in *Murphy*, the Court noted that the dawning of the "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity," created opportunities for abuse that could not have been anticipated. 378 U.S. at 55–56. So too here.

D. The Separate-Sovereigns Exception Is Unworkable.

"[T]he fact that a decision has proved 'unworkable'" is another "traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2008) (quoting *Payne*, 501 U.S. at 827); *see also Casey*, 505 U.S. at 854 (in considering whether to overrule precedent "we may ask whether the rule has proven to be intolerable simply in defying practical workability"). As the federal government's own workaround policy and this Court's precedents demonstrate, the separate-sovereigns exception is "unworkable."

1. Even the federal government acknowledges that some check is required "to protect 'the citizen from any unfairness that is associated with successive prosecutions.'" Br. for the U.S. in Opp'n at 11 (quoting *Rinaldi v. United States*, 434 U.S. 22, 27 (1977)). That check, adopted in "response to repeated

expressions of concern by Members of this Court," 434 U.S. at 27, is the so-called *Petite* Policy. *See* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J. L. & PUB. POL'Y 167, 178 (2004). It is an internal, discretionary policy of selective restraint. The policy was later codified in the United States Attorneys' Manual, which provides:

> The policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

UAM § 9-2.031(A).

The government, however, has not "faithfully followed" the *Petite* Policy. *United States v. Wilson*, 413 F.3d 382, 388–89 (3d Cir. 2005). To the contrary, its application has been widely criticized as "erratic and unpredictable." Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N.D. L. REV. 915, 927 (1994); *see*

also, e.g., *United States v. Belcher*, 762 F. Supp. 666, 673 (W.D. Va. 1991) (noting that the prosecutor's actions stood "in sharp contrast to the normal practices regarding dual prosecutions" described in the *Petite* Policy). Just ask Gamble: If the government believes that a "substantial federal interest" is present in a mine-run gun possession case, when will the Policy ever bar re-prosecution? Notably, defendants like Gamble cannot even ask that question, as "the Petite policy, an internal policy of the Justice Department, is not to be enforced against the government." *United States v. Michel*, 588 F.2d 986, 1003 n. 19 (5th Cir. 1979). Moreover, because adherence to the policy is discretionary, it is susceptible to "manipulation and political pressure." White, *supra*, at 202.

Under the *Petite* Policy, then, an individual's constitutional right not to be twice put in jeopardy for the same offense hinges on an individual prosecutor's secretive application of a discretionary and indeterminate policy. *Stare decisis* does not require this Court to stick with a rule that has had such arbitrary and "mischievous consequences" for individual rights. *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965).

2. The separate-sovereigns exception has had unworkable doctrinal consequences, too. In particular, in attempting to apply the exception, this Court has repeatedly been forced to decide which entities qualify as "separate sovereigns" for purposes of the Double Jeopardy Clause. Answering that subsidiary question has yielded its own precedential tangle because, "[f]or whatever reason, the test [this Court] ha[s] devised to decide whether two

governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty." *Sanchez Valle*, 136 S. Ct. at 1870.

Application of that test has yielded unpredictable and unworkable results. On the one hand, states and Indian tribes are deemed separate sovereigns, because the source of their sovereignty pre-dates the Constitution—or is deemed to pre-date the Constitution in the case of states joining the Union after the original 13. *See id.* at 1871–72. On the other hand, "a municipality cannot qualify as a sovereign distinct from a State—no matter how much autonomy over criminal punishment the city maintains." *Id.* Nor do the Philippine Islands or Puerto Rico qualify as "sovereigns," even though the Commonwealth of Puerto Rico, in other contexts, has "a claim" to sovereignty "at least as strong as that of any State." *Alfred L. Snapp & Son Inc. v. Puerto Rico*, 458 U.S. 592, 608 n.15 (1982); *see Sanchez Valle*, 136 S. Ct. at 1873, 1876–77. The senselessness of holding that Puerto Rico is not a separate sovereign, while the Sioux Nation is, is what led Justices Ginsburg and Thomas to call for "fresh examination" of the separate-sovereigns exception. 136 S. Ct. at 1877.

E. No Reliance Interests Justify Retaining the Separate-Sovereigns Exception.

Finally, the kinds of reliance interests "that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation" are entirely absent here. *Casey*, 505 U.S. at 854. Consideration of such reliance interests, particularly in the context of "cases involving property and contract rights," can sometimes justify retaining an

erroneous legal rule pursuant to which private parties have structured their affairs. *Payne*, 501 U.S. at 828. Naturally, "the opposite is true in cases . . . involving procedural and evidentiary rules." *Id.*

This case falls on the "procedural" side of the line. No property rights hinge on the continued existence of the separate-sovereigns exception. And no contractual expectations will be frustrated by the elimination thereof.

Aside from the consumers and authors of criminal-procedure casebooks and treatises, the only people who could conceivably be said to rely on the separate-sovereigns exceptions are prosecutors who wish to use that exception to bypass a defendant's constitutional right not "to be twice put in jeopardy" for the "same offence." U.S. Const. amend. V. But vindicating the text, purpose, and original meaning of the Double Jeopardy Clause will not seriously hinder law-enforcement efforts. At least 20 states already reject the separate-sovereigns exception as a matter of state law[3]; another four reject the doctrine unless

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[3] ARK. CODE ANN. § 5-1-114; CAL. PEN. CODE §§ 656, 793; COLO. REV. STAT. § 18-1-303; DEL. CODE ANN. tit. 11 § 209; GA. CODE ANN. § 16-1-8(c); HAW. REV. STAT. ANN. § 701-112; IDAHO CODE § 19-315; 720 ILCS § 5/3-4(c); IND. CODE ANN. § 35-41-4-5; KY. REV. STAT. ANN § 505.050; MINN. STAT. ANN. § 609.045; MONT. CODE ANN. § 46-11-504; NEV. REV. STAT. ANN. § 171.070; N.Y. CRIM. PROC. § 40.20; N.D. CENT. CODE, § 29-03-13; 18 PA. CONS. STAT. § 111; UTAH CODE ANN. § 76-1-404; VA. CODE ANN. § 19.2-294; WASH. REV. CODE ANN. § 10.43.040; WIS. STAT. ANN. § 939.71.

an important state interest is at issue[4]; and another 13 reject it for controlled-substances offenses.[5] Yet no chaos has ensued in their criminal-justice systems.

That is unsurprising: Because this Court deems two crimes to be different offenses any time "each offense contains an element not contained in the other," *Dixon*, at 696 (discussing *Blockburger*, 284 U.S. at 304), it will still be the unusual case in which the federal and state governments may not both

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[4] N.J. STAT. ANN. § 2C:1-11 (rejecting state prosecution after federal prosecution for same offense within the meaning of *Blockburger* unless the state law is "intended to prevent a substantially more serious harm or evil"); *Angiulo v. Commonwealth*, 514 N.E.2d 669, 671-72 (Mass. 1987) (rejecting separate-sovereigns exception unless "Federal crime is punishable much more lightly than the parallel State crime"); *People v. Childers*, 587 N.W.2d 17, 18 (Mich. 1998) (rejecting separate-sovereigns exception as a matter of state constitutional law unless "the interests of the state of Michigan and the jurisdiction which initially prosecuted are substantially different"); *State v. Hogg*, 385 A.2d 844 (N.H. 1978) (rejecting separate-sovereigns exception at least in cases of prior acquittal).

[5] CONN. GEN. STAT. § 21a-282; IOWA CODE § 124.405; NEB. Rev. Stat. § 28-427; N.M. STAT. ANN. § 30-31-27; N.C. GEN. STAT. § 90-97; OHIO REV. CODE ANN. § 2925.50; 63 OKLA. STAT. tit. 63 § 2-413; OR. REV. STAT. § 475.265; R.I. GEN. LAWS § 21-28-4.12; S.C. CODE ANN. § 44-53-410; VT. STAT. ANN. tit. 18 § 4220(b); W. VA. CODE § 60A-4-405; WYO. STAT. § 35-7-1035; *see also* HAW. REV. STAT. ANN. § 712-1254; 720 ILCS § 570/409; MICH. COMP. LAWS ANN. § 333.7409; NEV. REV. STAT. ANN. § 453.346; N.H. REV. STAT. ANN. § 318-B:29; N.J. STAT. ANN. § 24:21-25; N.D. CENT. CODE, § 19-03.1-28; 35; PA. CONS. STAT. tit. 35 § 780-142; WIS. STAT. ANN. § 961.45. For a history of these provisions, see Adam H. Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts §§ 3.24-3.26 (2001).

bring some charge based on the same criminal occurrence. *Cf. United States v. Johnson*, 462 F.2d 423, 426 (3d Cir. 1972) (noting that some have criticized *Blockburger* "as being too broad"). And even then, "in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law," nothing prevents them from "cooperat[ing] in hybrid adjudication to prevent ordinary citizens from being whipsawed." Amar, *supra*, 48.

More importantly, no party has a legitimate reliance interest in continuing to deprive individuals of their constitutional rights. *Arizona v. Gant*, 556 U.S. 332, 349 (2009). "If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Id.* For that reason, this Court has "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice." *Id.* at 348. It should not start now.

CONCLUSION

For the foregoing reasons, the Court should overrule the separate-sovereigns exception and reverse the judgment below.

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September 4, 2018

No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Court should reinterpret the Double Jeopardy Clause and overturn the long-held understanding that offenses against the laws of different sovereigns are not the "same offence."

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In the Supreme Court of the United States

No. 17-646

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 694 Fed. Appx. 750. The order of the district court (Pet. App. 5a-10a) is not published in the Federal Supplement but is available at 2016 WL 3460414.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. The petition for a writ of certiorari was filed on October 24, 2017, and granted on June 28, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that "[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Alabama, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). J.A. 29. The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. J.A. 31, 33. The court of appeals affirmed. Pet. App. 1a-4a.

1. In November 2015, a police officer in Mobile, Alabama, found a loaded 9mm handgun, a digital scale, and two bags of marijuana in petitioner's car following a traffic stop. J.A. 27; Presentence Investigation Report (PSR) ¶¶ 5-6. Petitioner had a history of violent crimes, including incidents in which he had endangered others by firing a gun. PSR ¶¶ 6-7, 25-28.

First, in 2008, petitioner had pleaded guilty to Alabama second-degree robbery, based on his use of force during a theft. PSR ¶ 25. Although he was sentenced to ten years of imprisonment, he served only nine months of that term, with the balance suspended pending completion of three years of probation. *Ibid.*

Second, a year after completing probation, petitioner committed two domestic-violence offenses. PSR ¶¶ 26-27. In March 2013, petitioner fired a gun when his girlfriend attempted to leave their home with their child after an argument. PSR ¶ 26. And in May 2013, petitioner forced his way into his former girlfriend's home, chased her out, and was attempting to hit her when the police arrived. PSR ¶ 27. Petitioner pleaded guilty to two Alabama third-degree domestic-violence offenses and received concurrent sentences of 180 days of imprisonment, with all but 42 days suspended pending completion of one year of probation. PSR ¶¶ 26-27.

Third, in October 2014, soon after completing his domestic-violence probation term, petitioner fired a handgun into a title-loan business while two people were inside. PSR ¶ 28. He was charged by the State with two counts of discharging a gun into an occupied building. *Ibid.* Proceedings in that case were still pending when petitioner was stopped with the drugs and gun in November 2015. See *ibid.*

2. Petitioner's possession of the gun with that criminal history violated both federal and state law, and he was charged with both federal and state crimes. In April 2016, a federal grand jury in the Southern District of Alabama indicted petitioner for the federal offense of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). J.A. 10-12. As relevant here, Section 922(g)(1) makes it "unlawful for any person * * * who has been convicted in any court of * * * a crime punishable by imprisonment for a term exceeding one year"—in petitioner's case, his second-degree robbery conviction—to possess a firearm in and affecting interstate commerce. 18 U.S.C. 922(g)(1); see Pet. App. 6a; J.A. 50-51.

Meanwhile, in late 2015, Alabama had separately charged petitioner, under its own criminal code, with a firearm offense and two state drug offenses. See Pet. App. 5a-6a; PSR ¶ 29. The relevant state-law firearm offense prohibits a "person who has been convicted * * * of committing or attempting to commit a crime of violence, misdemeanor offense of domestic violence, violent offense as listed in [Ala. Code §] 12-25-32(15) [(Supp. 2015)], anyone who is subject to a valid protection order for domestic abuse, or anyone of unsound mind" from possessing a firearm. Ala. Code § 13A-11-72(a) (2015); see *id.* §§ 12-25-32(15) (Supp. 2015), 13A-

11-70(2) (2015) (defining relevant predicates to include robbery).

3. Petitioner opted to enter a guilty plea in state court, thereby ensuring that jeopardy attached first in the state proceedings. See PSR ¶¶ 28-29. All of the pending state charges against petitioner—the shooting charges, the drug charges, and the firearm charge—were collectively resolved with concurrent, substantially suspended, sentences. One of the drug and one of the shooting charges were dropped, see *ibid.*, and although petitioner received concurrent ten-year terms of imprisonment on the remaining counts, all but 12 months were suspended. *Ibid.*; CC-2016-2739 Ala. Order 1 (May 18, 2016) (Ala. Order A); CC-2016-2740 Ala. Order 1 (May 18, 2016) (Ala. Order B). The suspension will become permanent following successful completion of a three-year probationary term. *Ibid.* If he qualified, petitioner was allowed to serve his 12 months of imprisonment in a work-release program. Ala. Order A at 1; Ala. Order B at 1.

4. After his state sentencing, petitioner moved to dismiss the federal indictment under the Double Jeopardy Clause. Pet. App. 6a. He argued that his decision to plead guilty to the state firearm offense during the pendency of the federal charge precluded any further federal proceedings for his violation of Section 922(g)(1). *Ibid.* In his view, the state and federal offenses are the "same offence," U.S. Const. Amend. V, and whichever reached trial or plea first would vitiate the other and become the only permissible charge. See Pet. App. 6a.

This Court, however, "has plainly and repeatedly stated" that two offenses "are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if

they are prosecuted by different sovereigns." *Heath* v. *Alabama*, 474 U.S. 82, 92 (1985). The district court accordingly denied the motion. Pet. App. 5a-10a.

The government sought and received a short continuance so that the U.S. Attorney's Office could obtain direction from the Department of Justice about whether to proceed with the federal charge. J.A. 13-14. Under the Department's longstanding "Petite Policy," the government will pursue a federal prosecution after a state disposition arising from "substantially the same act(s) or transaction(s)" only when, *inter alia*, the state case has "left [a] substantial federal interest demonstrably unvindicated." Offices of the U.S. Atty's, U.S. Dep't of Justice, *Justice Manual* § 9-2.031(A) and (D) (updated July 2009), https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals (*Justice Manual*); see *Petite* v. *United States*, 361 U.S. 529, 531 (1960) (per curiam).

The federal case ultimately resolved through a plea agreement, and the government sought a sentence that it viewed as appropriate under federal law in light of petitioner's violation of the federal felon-in-possession statute and history of violent crimes. J.A. 16-28, 42-53. The district court determined that petitioner's advisory Sentencing Guidelines range was 46 to 57 months, based on a total offense level of 21 and a criminal history category of III. D. Ct. Doc. 39, at 1 (Oct. 24, 2016) (Statement of Reasons). The court sentenced petitioner to 46 months of imprisonment and ordered the sentence to run concurrently with petitioner's state sentences. J.A. 31. Petitioner's total term of imprisonment for the full set of state and federal crimes to which he pleaded guilty—the state shooting offense, the state firearm offense, the state drug offense, and the federal firearm

offense—is thus identical to what he would have received had he been prosecuted for the federal firearm offense alone.

5. The court of appeals affirmed. Pet. App. 1a-4a. The court recognized that, under this Court's precedent, "prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns." *Id.* at 2a.

SUMMARY OF ARGUMENT

An unbroken line of this Court's decisions, whose origin reaches back nearly two centuries, has correctly understood the violation of a state law and the violation of a federal law as distinct "offence[s]" under the Double Jeopardy Clause. That understanding is grounded in text and federalism; accords with the Clause's overall application, history, and common-law origins; and allows politically accountable decisionmakers to pursue the distinct sovereign interests of the United States and States in appropriate cases without undue interference from one another or from foreign countries. Petitioner offers no sound reason for suddenly reversing course.

I. Petitioner does not dispute that the term "offence" refers not simply to conduct, but to the "transgression *of a law*." A transgression of two independent sovereigns' laws, even through the same act, is thus two different "offence[s]." The constitutional text expressly distinguishes "offences" based on the sovereign "against" which they are committed. The federalist structure of the Constitution likewise dictates that offenses against the laws of the several States and the United States are not "the same." And this Court's general double-jeopardy jurisprudence on the "same"-ness of "offence[s]"

presumes a single legislature and a single prosecuting authority.

For nearly 170 years, repeatedly and without exception, this Court has relied on the plain meaning of "offence" and principles of federalism to recognize that state and federal offenses are not the "same." And both before and after incorporating the Double Jeopardy Clause against the States, the Court has rejected invitations—which raised arguments nearly identical to petitioner's—to redefine the Clause. Now, as then, such a reinterpretation would require departing from the Constitution's text and its federalist scheme.

The Court's sovereign-specific understanding of "offence" is analytically and historically sound. The evidence does not support petitioner's suggestion that the Clause implicitly incorporates an asserted common-law rule under which foreign criminal judgments can bar domestic ones. Such a rule would allow a foreign government—whether the British at the time of the Framing or some other unfriendly nation now—to preclude U.S. prosecutions for crimes against Americans.

The history of the Founding shows that the Framers would have balked at such a remarkable surrender of sovereignty to other nations, and no well-settled common-law rule supports such an extraordinary interpretation of the Clause. Petitioner and his amici cite no reported pre-Framing decision that actually applied the foreign-preclusion bar he posits, and no treatise could or would have established any such universal rule. The notion that such a rule was so clear as to have made its way without mention into the Double Jeopardy Clause is also belied by disagreement on the issue in early state-court decisions.

II. Even if petitioner's arguments had some potential merit, no justification supports jettisoning the Court's longstanding and embedded precedent. A new approach would inject a significant anomaly into this Court's "same offence" jurisprudence, saddle courts with the confounding task of comparing different sovereigns' laws, and threaten the finality of convictions obtained in reliance on the long-held understanding that, in cases involving separate prosecutions by different sovereigns, it does not matter which sovereign goes first.

Any concerns of potential unfairness from particular separate prosecutions are best addressed by policymakers, not courts. Construing the Double Jeopardy Clause to bar *all* separate prosecutions would produce a host of undesirable consequences. It would, for example, inhibit enforcement of domestic-violence laws and preclude vindication of distinct state and federal interests in cases like a local breach-of-peace whose victim is a federal official. Legislatures, including Congress, have balanced the competing concerns of successive prosecutions by enacting laws that preclude them in certain cases, and policies like the federal Petite Policy require case-specific judgments that a successive prosecution is actually warranted. Courts, moreover, can address any perceived case-specific inequities through sentencing decisions, as the circumstances of petitioner's own case illustrate.

ARGUMENT

Long throughout the Nation's history, this Court has consistently recognized that state and federal crimes are not the "same offence" under the Double Jeopardy Clause and has squarely rejected arguments to the contrary. That precedent reflects the correct understanding of the text of the Clause, flows from the federalist

system established in the Constitution, and comports with the Framing-Era understanding of the double-jeopardy bar. Petitioner provides no sound reason for the Court suddenly to reverse course. The evidence does not support either a retreat from the foundational separateness of state and federal governments or the belated discovery of a long-lost rule under which foreign nations would have the power to bar U.S. prosecutions. Nor should the Court invite the serious practical consequences of categorically precluding politically accountable officials from ever determining that a separate prosecution is warranted—which would hamstring state, tribal, and federal law enforcement; unsettle long-final convictions; and force upon courts the vexing task of comparing different sovereigns' laws. This Court should instead reaffirm that the Double Jeopardy Clause continues to mean what it has always meant.

I. THIS COURT HAS CORRECTLY RECOGNIZED THAT STATE AND FEDERAL CRIMES ARE NOT THE "SAME OFFENCE" UNDER THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This Court has consistently recognized that the Clause imposes no bar "when the 'entities that seek successively to prosecute a defendant for the same course of conduct are separate sovereigns.'" *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)) (brackets omitted). The Clause explicitly allows multiple prosecutions for distinct "offence[s]," and the Court "has always understood the words of the Double Jeopardy Clause to reflect" the "principle that a single act constitutes an 'offence' against each sovereign whose

laws are violated by that act." *Heath*, 474 U.S. at 93. That understanding—which "finds weighty support" not only in the Clause's language but also "in the historical understanding and political realities of the States' role in the federal system," *id.* at 92—is correct.

A. The Transgression Of One Sovereign's Law Is Not The "Same Offence" As The Transgression Of A Different Sovereign's Law

The Court's longstanding recognition that "offence[s]" against two different sovereigns are not the same reflects the plain meaning of the term "offence." An "offence" under the Double Jeopardy Clause is the violation of a particular law of a particular sovereign. A single act can therefore constitute multiple "offence[s]" that may be separately prosecuted and punished.

1. An "offence" is the transgression of a specific sovereign's law

a. This Court has repeatedly explained, and petitioner does not appear to dispute, that the term "offence" refers not to a defendant's conduct alone, but instead to the "transgression of a law." *Heath*, 474 U.S. at 88 (quoting *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 19 (1852)). The Court deviated from that understanding once, in *Grady* v. *Corbin*, 495 U.S. 508 (1990), which entertained a conduct-based approach to double jeopardy. But the Court quickly recognized its mistake and endorsed Justice Scalia's dissent in *Grady* as the correct statement of the law. See *United States* v. *Dixon*, 509 U.S. 688, 704 (1993).

As Justice Scalia observed, "the language of the Clause * * * protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*." *Grady*, 495 U.S. at 529 (dissenting

opinion). "'Offence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Ibid.* (quoting *Dictionarium Britannicum* 517 (Bailey ed. 1730)); see *ibid.* (citing other dictionaries from the relevant time period); see also, *e.g.*, Richard Burn & John Burn, *A New Law Dictionary* 510-511 (1792) ("OFFENCE, is an act committed against law, or omitted where the law requires it."); 2 Timothy Cunningham, *A New and Complete Law Dictionary* 454 (1764) (same); Giles Jacob, *A New Law Dictionary* 542 (6th ed. 1750) (same).

It is thus settled that "[i]f the same conduct violates two (or more) laws, then each offense may be separately prosecuted." *Grady*, 495 U.S. at 529 (Scalia, J., dissenting); see, *e.g.*, *Dixon*, 509 U.S. at 710. Unless both the conduct *and* the laws are deemed identical, successive prosecutions do not fall within the defendant-protective purposes of the Clause. Nor do such prosecutions inherently infringe any fundamental-fairness principle protected by the Due Process Clause. See, *e.g.*, *Hoag* v. *New Jersey*, 356 U.S. 464, 467-469 (1958).

b. The plain meaning of "offence"—"transgression of *a law*"—distinguishes the violation of two independent sovereigns' laws as different "offence[s]" under the Double Jeopardy Clause. Indeed, other portions of the constitutional text use the term "offence" in precisely that sovereign-specific way.

The term "offence" appears not only in the Double Jeopardy Clause, but in two other Clauses, each of which refers to an offense as a transgression committed "against" a particular source of sovereign law. First, the Law of Nations Clause gives Congress the power "[t]o define and punish * * * Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Second, the

Pardon Clause grants the President the power to grant reprieves and pardons "for Offences against the United States, except in Cases of Impeachment." U.S. Const. Art. II, § 2, Cl. 1.[1]

The direct implication of those modifying phrases is that an "offence" exists only by reference to the sovereign lawmaking authority that defines it. "At the founding, the law of nations was considered a distinct 'system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.'" *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1416 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (citation omitted). And the Court has observed that the Pardon Clause "make[s] clear that the pardon of the President was to operate upon offenses against the United States *as distinguished from* offenses against the States." *Ex parte Grossman*, 267 U.S. 87, 113 (1925) (emphasis added). The Framers' express recognition that the underlying source of sovereign law is a key aspect of an "offence" undermines the suggestion that they would have viewed state and federal offenses as the "same."

c. Petitioner errs in suggesting (Br. 10) that, had the Framers intended a sovereign-specific approach to the term "offence" in the Double Jeopardy Clause, they

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[1] The variations in the capitalization of "offence" within the Constitution do not affect the word's meaning. See Philip Huff, *How Different are the Early Versions of the United States Constituti .! An Examination*, 20 Green Bag 2d 163, 169 (2017) (noting that the engrosser of the parchment Constitution "famously capitalized virtually every noun in the text, whether proper or common," while copies of the Constitution printed in September 1787 "dropp[ed] this convention"); Akhil Reed Amar, *Our Forgotten Constitution*, 97 Yale L.J. 281, 281-285 (1987) (discussing capitalization variations in early copies of the Constitution).

would have adopted a proposal by Representative Partridge to add the words "by the United States" to an earlier draft of the Clause. As a threshold matter, such a rejected modification of later-discarded language provides no basis for disregarding the plain meaning and context of the term "offence" in the Clause as ultimately ratified. See *United States* v. *Craft*, 535 U.S. 274, 287 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (citation and internal quotation marks omitted).

In any event, petitioner's argument is inherently flawed. As applied to the wording then under consideration, Representative Partridge's proposal would have resulted in language that barred, "in cases of impeachment," "more than one trial or one punishment for the same offence" "by any law of the United States." 1 Annals of Cong. 753 (1789). Contrary to petitioner's suggestion, the phrase "by any law of the United States" would *not* have modified the term "offence." As the other portions of the constitutional text discussed above illustrate, offenses are committed "against" a sovereign's law, not "by" it. The phrase "by any law of the United States" would have modified "one trial or one punishment"—the things that "the law of the United States" could actually bring about—not "offence." Indeed, the debate immediately preceding Representative Partridge's proposal suggests that he proposed it to ensure that the Clause be construed to bar only a second trial sought by the government, and not one sought by the defendant as a remedy for a claim of error. See *ibid.* (statement of Rep. Sherman).

Furthermore, even assuming the proposal had been intended to limit the Clause's scope to offenses against

the United States, its rejection would reflect only that such a limitation was viewed as unnecessary. It was already understood that the Double Jeopardy Clause, at that time, was directed at the federal government alone, see Crim. Pro. Professors Amicus Br. 8-9, which did not have power to prosecute state crimes. The use of the sovereign-specific term "offence," rather than a more verbose phrase like "offence against the United States," was accordingly sufficient. Had the Framers intended a broader prohibition, they would have used a term like "conduct" or "acts," not "offence." See *Grady*, 495 U.S. at 529 (Scalia, J., dissenting).

2. The Constitution's federalist structure distinguishes between federal and state "offence[s]"

The Constitution's foundational dichotomy between state and federal law makes clear that an act that is both a state crime and a federal crime "transgress[es] * * * a law" of two different sovereigns—a State and the United States—and thus is two different "offence[s]" under the Double Jeopardy Clause. In setting forth the fundamental precepts of our dual-sovereignty federalist structure, the Framers would not have used a law-focused term like "offence" to conflate, rather than distinguish, the States and the United States.

a. Nothing is more central to the constitutional framework than the "axiomatic" principle that "'in America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it.'" *Heath*, 474 U.S. at 92-93 (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819)) (brackets omitted); see, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 283 (2011) ("Dual sovereignty is a defining

feature of our Nation's constitutional blueprint.") (citation omitted).

The several States and the United States "'derive power from different sources,' each from the organic law that established it." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978) (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)) (brackets omitted). Each "is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect." *United States* v. *Cruikshank*, 92 U.S. 542, 549 (1876). Thus, "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'" *Wheeler*, 435 U.S. at 320 (quoting *Lanza*, 260 U.S. at 382).

Petitioner's own case is illustrative. The federal firearm statute at issue here includes an interstate-commerce element, see 18 U.S.C. 922(g)(1), while Alabama law requires that petitioner's state firearm offense be committed in that State, see *Ex parte James*, 780 So. 2d 693, 694-696 (Ala. 2000). Those jurisdictional requirements tether the substantive offenses to each sovereign's particular powers, "thus establishing legislative authority," *Torres* v. *Lynch*, 136 S. Ct. 1619, 1630 (2016). And they underscore the connection between the criminal statute defining an offense and the sovereignty of the specific government that adopted that law.

b. In no respect can a conviction for a state offense be considered a conviction for a federal offense. Even if the conviction was for an act that federal law also criminalizes, the independent proscription, prosecution, and punishment of that act by the State is not attributable to the United States.

Any suggestion (cf. Pet. Br. 30) that the state and federal governments are exercising mixed or delegated authority cannot be squared with this Court's repeated insistence that each entity be accountable for its own laws and actions. See, *e.g.*, *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476-1477 (2018). The federal government did not bestow the authority under which a State enacts criminal laws, adopt the particular state criminal law at issue, or pursue the state criminal case against the defendant. "Crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State." *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892). Because "the United States ha[s] no power to execute the penal laws of the individual states," an "offence against the state law" is one that "the courts of the state alone could punish." *Gwin* v. *Breedlove*, 43 U.S. (2 How.) 29, 37 (1844).

Petitioner attempts to justify an approach to "same offence" at odds with the Constitution's federalist structure on the ground that federalism is intended to be liberty-enhancing. See Pet. Br. 29-30. But federalism enhances liberty through the *separation* of States and the federal government, not through their conflation. "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). The necessary consequence of preserving liberty by dividing power between dual sovereigns is dual regulation, such

as "the power of taxation" that is "concurrently exercised" by both States and the federal government. *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 155 (1886). Either sovereign may therefore elect to proscribe conduct under its own laws. As this Court has explained, the citizen of a State "owes allegiance to two sovereignties," and "[i]n return" for his ability to "demand protection from each within its own jurisdiction," he "must pay the penalties which each exacts for disobedience to its laws." *Cruikshank*, 92 U.S. at 550-551.

c. Treating the United States and a State, or one State and another State, as a single sovereign for purposes of criminal prosecution fails "to ensure that States function as political entities in their own right." *Bond*, 564 U.S. at 221. If States and the federal government have independent authority to *define* criminal offenses—a principle that petitioner does not dispute—it necessarily follows that they have independent authority to *enforce* them.

At times, the federal government and the States adopt criminal laws proscribing the same conduct. See, *e.g.*, *Cruikshank*, 92 U.S. at 550. But each "ha[s] legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both." *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977) (per curiam). For example, this Court has recognized that the federal government has an independent interest in the enforcement of civil-rights laws that can justify prosecuting local law-enforcement officers for beating an African-American man to death, even if a State may also prosecute the murder under its criminal law. See *Bartkus* v. *Illinois*, 359 U.S. 121, 136-137 (1959) (discussing *Screws* v. *United States*, 325 U.S. 91

(1945)); *Screws*, 325 U.S. at 93, 108-109 (plurality opinion).

The Court has observed that it "'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines'" to "deny a State its power to enforce its criminal laws because another State has won the race to the courthouse." *Heath*, 474 U.S. at 93 (quoting *Bartkus*, 359 U.S. at 137). "A State's interest in vindicating its sovereign authority through enforcement of its laws," the Court explained, "by definition can never be satisfied by another State's enforcement of *its* own laws." *Ibid.* Likewise, "the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government." *Ibid.*; see, *e.g.*, *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (describing "the enforcement of federal criminal statutes" as an "important federal interest[]").

3. A sovereign-specific interpretation of "same offence" underlies multiple aspects of this Court's double-jeopardy jurisprudence

This Court's recognition of the "fundamental principle" that the term "offence" is sovereign-specific, *Heath*, 474 U.S. at 93, is not limited to its precedent addressing prosecutions by different sovereigns. It is also inherent in other features of the Court's double-jeopardy jurisprudence that petitioner does not challenge.

a. The very decision on which petitioner relies (Br. 10) to define "same offence"—*Blockburger* v. *United States*, 284 U.S. 299 (1932)—is itself premised on a sovereign-specific understanding of that phrase, which presumes that the offenses being compared were en-

acted by a single sovereign legislature. *Blockburger* addressed a double-jeopardy challenge to the prosecution of a single drug sale under two federal criminal statutes. *Id.* at 303-304. As the Court has explained, the Double Jeopardy Clause "serves principally as a restraint on courts and prosecutors," while a "legislature remains free * * * to define crimes and fix punishments." *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). The question whether the violations of the two statutes in *Blockburger* were the "same offence" thus turned on "whether the legislature" —there, Congress—"*intended* that each violation be a separate offense." *Garrett* v. *United States*, 471 U.S. 773, 778 (1985) (emphasis added); see *Blockburger*, 284 U.S. at 304.

In order "to help determine legislative intent," the Court in *Blockburger* applied "a rule of statutory construction," *Garrett*, 471 U.S. at 778-779, under which it examined whether "each provision require[d] proof of a fact which the other does not," *Blockburger*, 284 U.S. at 304. Because that was true of the provisions at issue in *Blockburger*, the Court found them to be separate offenses. *Ibid.* The Court has subsequently observed that, at least in some contexts, a result suggested by *Blockburger* "must of course yield to a plainly expressed contrary view on the part of Congress" about whether offenses are the same or different. *Garrett*, 471 U.S. at 779.

That analysis of legislative intent presupposes that the same legislature defined the laws at issue, or at least that overlapping legal definitions presumptively reflect the same sovereign interest. Cf. *Sanchez Valle*, 136 S. Ct. at 1870 (holding that offenses defined by Congress and a legislature exercising authority derived from Congress can be the same). But it makes little sense to

resolve the "same offence" inquiry through "a rule of statutory construction" designed "to help determine legislative intent," *Garrett*, 471 U.S. at 778-779, when two separate legislatures are acting within their independent sovereign spheres. Such legislatures could easily enact laws that *Blockburger* might classify as the "same"—*e.g.*, state robbery and federal bank robbery, see *Bartkus*, 359 U.S. at 121-122—but that cannot be presumed to reflect any legislative intent that they are a single "offence."

b. The Court's definition of "same offence" in the context of a trial following a prior acquittal similarly presumes prosecution by a single sovereign. The Court has held that, in that context, the Double Jeopardy Clause borrows from civil law certain aspects of "collateral estoppel" or "issue preclusion." *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 356-358 & n.1 (2016). Under the incorporated issue-preclusion principles, even if the crimes are legally distinct, "it is appropriate to treat [separate] charges as the 'same offence'" when a prior acquittal on one charge necessarily reflects the failure to prove an "ultimate fact" that would also be necessary to prove the other charge. *Yeager* v. *United States*, 557 U.S. 110, 119, 123 (2009).

Even in civil law, however, preclusion principles generally apply only to the parties to the prior litigation, or those in some special relationship with them. See, *e.g.*, *Taylor* v. *Sturgell*, 553 U.S. 880, 892-895 (2008); see also, *e.g.*, *Bravo-Fernandez*, 137 S. Ct. at 358 (cautioning that issue preclusion is more "guarded" in criminal cases). Their incorporation into the Double Jeopardy Clause thus presupposes that both the first case (the acquittal) and the second case (challenged as a double-jeopardy violation) were prosecuted under the same

sovereign authority. That is plainly true when the prosecuting sovereigns are the same, and may be true when one derives power from the other. But it is difficult to see how it could be true when they are independent sovereigns vindicating their own legal interests under their own criminal codes.

B. The Constitution's Text And Structure Have Underpinned This Court's Consistent Treatment Of State And Federal Crimes As Separate "Offence[s]"

This Court's longstanding recognition that an offense against a State is different from an offense against the United States, or an offense against another State, follows inexorably from the plain meaning of "offence" and the Constitution's federalist design.

1. A pair of cases decided in 1820, although not directly addressing the Double Jeopardy Clause, illustrates an early understanding of offenses as sovereign-specific. In each case, the Court described successive prosecutions as impermissible only if they were premised on the same source of law.

In *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820), the Court considered the circumstances under which certain crimes at sea might be punished by the United States. In the course of its discussion, the Court differentiated between successive prosecutions by different sovereigns for piracy and murder. See *id.* at 197. Although the Court stated that an acquittal on a piracy charge in the court of any "civilized State" would bar a prosecution in another "civilized State," *ibid.*, the Court was "inclined to think that an acquittal" on murder charges in the United States "would *not* have been a good plea in a Court of Great Britain," *ibid.* (emphasis added). In drawing that distinction, the Court focused on the source of law defining each crime, observing that

piracy was "an offence within the criminal jurisdiction of all nations" and "punished by all," while murder was "punishable under the laws of each State" and was not "within this universal jurisdiction." *Ibid.*; see *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 158-160 (1820) (explaining that piracy is an offense against the law of nations). The Court's analysis in *Furlong* thus reflects an understanding that offenses against different bodies of sovereign law are not the same.

Two weeks earlier, in *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Court held that a Pennsylvania court martial had jurisdiction "to enforce the laws of Congress"—*i.e.*, federal law—against delinquent militia men who had disobeyed the President's call. *Id.* at 32 (opinion of Washington, J.). Justice Washington, who wrote the only opinion in support of the judgment (in which other Justices in the majority "d[id] not concur in all respects," *ibid.*), suggested that if jurisdiction were proper in both state and federal military courts, then final adjudication of the federal offense in one would bar the other from prosecuting the same federal offense. *Id.* at 31. That suggestion was premised on Justice Washington's "belief that the state statute imposed state sanctions for violation of a *federal* criminal law," *Bartkus*, 359 U.S. at 130 (emphasis added), rather than for an offense against Pennsylvania's own sovereignty.

Contemporary treatises accordingly understood *Houston* to countenance a separate-prosecution bar only when federal and state courts had "concurrent jurisdiction" over the same "*crime against the United States.*" 1 James Kent, *Commentaries on American Law* 374 (1826) (emphasis added); see Edward D. Mansfield, *The Political Grammar of the United States* 137

& n.3 (1835); William Rawle, *A View of the Constitution of the United States of America* 191 (1825); Thomas Sergeant, *Constitutional Law* 278 (2d ed. 1830). And this Court has likewise understood *Houston* to establish only "the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Bartkus*, 359 U.S. at 130.[2]

2. In a trio of decisions between 1847 and 1852—*Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 569 (1850); and *Moore* v. *Illinois*, *supra*—the Court "thoroughly considered the question" and recognized that state and federal crimes are not the "same offence" under the Double Jeopardy Clause. *Abbate* v. *United States*, 359 U.S. 187, 190 (1959). Those cases presented questions of whether federal and state criminal laws could target the same conduct. In holding that they could, the Court rejected the contention that a prosecution under one sovereign's laws would preclude a second sovereign from prosecuting the same conduct under its own laws.

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[2] The Court has rejected petitioner's contention (Br. 16) that Justice Story—who filed a solo dissent in the case—would necessarily have precluded successive prosecutions for separate crimes against separate sovereigns. See *Bartkus*, 359 U.S. at 130 n.18 (noting that while Justice Story "display[ed] dislike of the possibility of multiple prosecutions," he "also suggest[ed] the possibility that under some circumstances, a state acquittal might not bar a federal prosecution"); *Houston*, 18 U.S. (5 Wheat.) at 75 (Story, J., dissenting) ("It will be sufficient to meet [a case involving separate federal and state crimes] when it shall arise."). Indeed, Justice Story expressed no disagreement with *Furlong*'s discussion of successive murder prosecutions by separate sovereigns. See 18 U.S. (5 Wheat.) at 197.

In *Fox*, "[a]ll members of the Court agreed that the Fifth Amendment would not prohibit a federal prosecution even though based on the same act of passing [a] counterfeit coin that resulted in [a] state prosecution." *Abbate*, 359 U.S. at 191; see *Fox*, 46 U.S. (5 How.) at 434-435; *id.* at 439 (McLean, J., dissenting). The majority in *Fox* explained that, even if it were "probable or usual" for a defendant to face successive state and federal prosecutions for the same act, each government could properly prosecute the defendant for "offences falling within [its] competency." 46 U.S. (5 How.) at 435.

The Court reaffirmed that principle in *Marigold*, which likewise involved overlapping prohibitions of counterfeiting. See 50 U.S. (9 How.) at 570. *Marigold* reiterated *Fox*'s observation "that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." *Id.* at 569. The Court found "this distinction," as well as "the entire doctrines laid down in" *Fox*, to be "sound." *Id.* at 569-570.

The Court's decision in *Moore* made explicit that the federalism principles set forth in *Fox* and *Marigold* were part of the Double Jeopardy Clause. See *Abbate*, 359 U.S. at 191; *Moore*, 55 U.S. (14 How.) at 19-20. The Court explained that successive prosecutions "for the same acts" under separate federal and state laws would not mean that the defendant "would be twice punished for the same offence." *Id.* at 19. "An offense, in its legal signification," the Court explained, "means the transgression of a law." *Ibid.* "Every citizen of the United States," the Court observed, "is also a citizen of a State or territory. He may be said to owe allegiance to two

sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." *Id.* at 20.[3]

Petitioner's suggestion (Br. 22-23) that *Moore* is questionable precedent because it was a "fugitive-slave case" decided by "the Taney Court" is misplaced. Although the case involved the conduct of harboring fugitive slaves, the Court's interpretation of the Double Jeopardy Clause did not depend on that in any way. To the contrary, the Court explained that the principle it set forth was the same one applied in *Fox* and *Marigold*, which had involved "uttering or passing false coin." *Moore*, 55 U.S. (14 How.) at 20. The Court reiterated that "Congress, in the proper exercise of its authority, may punish [that] same act as an offence against the United States" even if the State separately punished it "as a cheat or fraud practised on its citizens." *Ibid.* A defendant, the Court emphasized, "could not plead the punishment by one in bar to a conviction by the other." *Ibid.*

The Court also illustrated its point with an example involving successive federal and state prosecutions for

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[3] Contrary to petitioner's suggestion (Br. 22-23), even Justice McLean, who disagreed with the result in *Moore* (as he had with the result in *Fox*), recognized that a state conviction would not preclude a later federal prosecution. See *Abbate*, 359 U.S. at 192; *Moore*, 55 U.S. (14 How.) at 21-22 (McLean, J., dissenting). Although Justice McLean would have precluded multiple prosecutions, he would have done so by invalidating the state law that overlapped with the federal one, not by applying the Double Jeopardy Clause. *Moore*, 55 U.S. (14 How.) at 22 (dissenting opinion). He recognized that double jeopardy in its terms "applies to the respective governments" and that "the punishment under the State law would be no bar to a prosecution under the law of Congress." *Fox*, 46 U.S. (5 How.) at 439 (McLean, J., dissenting); see *Moore*, 55 U.S. (14 How.) at 22 (McLean, J., dissenting) (incorporating *Fox* dissent).

"assault upon the marshal of the United States." *Moore*, 55 U.S. (14 How.) at 20. By "hindering him in the execution of legal process," the defendant would have committed "a high offence against the United States, for which [he] is liable to punishment." *Ibid.* But "the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony." *Ibid.* "That either or both may (if they see fit) punish such an offender," the Court continued, "cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence." *Ibid.*

This Court reiterated the point recognized in *Fox*, *Marigold*, and *Moore* in dictum in more than a dozen cases decided between 1875 and 1922. See *Cruikshank*, 92 U.S. at 550; *Coleman* v. *Tennessee*, 97 U.S. 509, 518 (1879); *Ex parte Siebold*, 100 U.S. 371, 389 (1880); *United States* v. *Arjona*, 120 U.S. 479, 487 (1887); *Cross* v. *North Carolina*, 132 U.S. 131, 139 (1889); *In re Loney*, 134 U.S. 372, 375 (1890); *Pettibone* v. *United States*, 148 U.S. 197, 209 (1893); *Crossley* v. *California*, 168 U.S. 640, 641 (1898); *Sexton* v. *California*, 189 U.S. 319, 322-323 (1903); *In re Heff*, 197 U.S. 488, 507 (1905); *Grafton* v. *United States*, 206 U.S. 333, 353-354 (1907); *Southern Ry. Co.* v. *Railroad Comm'n*, 236 U.S. 439, 445 (1915); *McKelvey* v. *United States*, 260 U.S. 353, 358-359 (1922); see also *Abbate*, 359 U.S. at 192-193; *Bartkus*, 359 U.S. at 132 & n.19.

3. In 1922, in *United States* v. *Lanza*, *supra*, the Court "squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction." *Bartkus*, 359 U.S. at 129. In *Lanza*, a fed-

eral grand jury had indicted the defendants on five offenses under the National Prohibition Act, but the district court dismissed the charges because the defendants had previously been convicted for violating similar state laws based on the same conduct. 260 U.S. at 378-379. In a unanimous opinion by Chief Justice Taft, this Court reversed, explaining that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.* at 382.

Lanza's holding followed from the Court's recognition that the United States and the State were "two sovereignties, * * * capable of dealing with the same subject matter within the same territory." 260 U.S. at 382. The Court explained that "[e]ach state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition." *Id.* at 381. Although state and federal laws might "vary in many particulars, including the penalties prescribed," the Court understood that those differences were "an inseparable incident of independent legislative action in distinct jurisdictions." *Ibid.* The Court recognized that, in enacting criminal laws, each government was "exercising its own sovereignty" by "determining what shall be an offense against its peace and dignity." *Id.* at 382.

The Court subsequently "accepted" the principle explained in *Lanza* in cases arising under a range of criminal statutes. *Abbate*, 359 U.S. at 194 (citing cases). In one of them, Justice Holmes, writing for the Court, observed that the "general proposition" that "the United States may punish acts injurious to the [Federal Reserve] System, although done to a corporation that the State also is entitled to protect," was "too plain to need

more than [a] statement." *Westfall* v. *United States*, 274 U.S. 256, 258 (1927).

4. In 1959, the petitioners in *Abbate* v. *United States*, *supra*, asked this Court to overrule *Lanza*. 359 U.S. at 195. This Court declined to do so, finding that the petitioners had advanced "[n]o consideration or persuasive reason not presented to the Court in the prior cases" for departing from its "firmly established" interpretation of the Double Jeopardy Clause. *Ibid.*

The Court considered many of the relevant substantive arguments in detail in an accompanying case, *Bartkus* v. *Illinois*, *supra*, decided the same day. The defendant in *Bartkus* had been acquitted on a federal bank-robbery charge and then tried and convicted for state robbery based on the same underlying conduct. 359 U.S. at 121-122. Because the Court had not yet applied the Double Jeopardy Clause as such to the States, the defendant challenged the successive prosecution under the Fourteenth Amendment's Due Process Clause. *Id.* at 124, 127. The Court recognized that the analysis would be informed by the same principles and precedents as the analogous double-jeopardy analysis, and it affirmed the defendant's life sentence on the successive state charge. See *id.* at 122, 128-129, 139.

The Court in *Bartkus* rejected the proposition that a state robbery conviction following an acquittal on a federal robbery charge for the same conduct would violate "fundamental principles of our society." 359 U.S. at 128. The Court examined "English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct," and found them to be both a "dubious" product of "confused and inadequate reporting" and "not rel-

evant" due to differences in the applicable legal regimes. *Id.* at 128 n.9. The Court also surveyed pre-*Fox* state-court precedent, which it found to be, at best, evenly divided on the permissibility of successive prosecutions by different sovereigns, with three States countenancing them, one having inconsistent law on the issue, and three—two of which had misread this Court's decision in *Houston*—discountenancing them. See *id.* at 130. The Court also found the more modern state cases that had considered the issue to be nearly unanimous (27 of 28) in allowing such prosecutions. See *id.* at 134-136 & n.24. The Court observed that legislatures could themselves address any perceived policy concerns and emphasized that it "would be in derogation of our federal system" to allow federal prosecution to deprive States of authority to enforce their own laws. *Id.* at 137; see *id.* at 137-138.

Abbate also underscored the practical reasons for adhering to the long-held understanding that the Double Jeopardy Clause does not preclude successive state and federal prosecutions. "The basic dilemma," the Court observed, is that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." 359 U.S. at 195. The prosecutions in *Abbate* itself—involving defendants who "insist[ed] that their Illinois convictions resulting in three months' prison sentences should bar [a] federal prosecution which could result in a sentence of up to five years"—illustrated the point. *Ibid.* "Such a disparity will very often arise," the Court observed, "when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest." *Ibid.* The Court

declined to adopt a system in which the federal government would have to "insure that there would be no state prosecutions for particular acts that also constitute federal offenses," recognizing that "it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses." *Ibid.*

5. This Court has also squarely rejected a more recent invitation to overwrite the sovereign-specific meaning of "offence" under the Double Jeopardy Clause. A decade after *Abbate* and *Bartkus*, the Court incorporated the Double Jeopardy Clause against the States. *Benton* v. *Maryland*, 395 U.S. 784, 787 (1969). It subsequently held in *Heath* v. *Alabama*, *supra*, that its longstanding interpretation of different sovereigns' crimes as different "offence[s]" remains good law.

The defendant in *Heath*, who committed a kidnapping and murder that crossed state lines, was convicted in Alabama for the capital offense of murder during a kidnapping after Georgia had already convicted him of murder. See 474 U.S. at 83-86. Relying on its precedents interpreting the Double Jeopardy Clause in cases involving state and federal prosecutions, the Court held that the second prosecution was constitutionally permissible. *Id.* at 88. The Court emphasized that its long-held understanding of the Clause "is founded on the common-law conception of crime as an offense against the sovereignty of the government." *Ibid.*

The Court accordingly reaffirmed that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88 (citation omitted). The Court observed that it had "uniformly held that the States are separate sovereigns

with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty.'" *Id.* at 89 (quoting *Wheeler*, 435 U.S. at 320 n.14). The Court noted that it had similarly found Indian tribes to have inherent sovereign authority, and it reiterated that the federal government, any State, or any sovereign tribe defines different "offence[s]" from the others under the Double Jeopardy Clause. See *id.* at 90-91.

The Court in *Heath* explicitly declined to abandon its prior jurisprudence and require judicial preapproval for a separate prosecution by a second sovereign. 474 U.S. at 91-93. The Court emphasized that the "express rationale" for its longstanding jurisprudence "is not simply a fiction," but is instead grounded in the text of the Double Jeopardy Clause and the "[f]oremost * * * prerogative[] of sovereignty," preserved by the Constitution, "to create and enforce a criminal code." *Id.* at 92-93. The Court accordingly saw "no reason" to "reconsider" the "fundamental principle" that "a single act constitutes an 'offence' against each sovereign whose laws are violated by that act." *Id.* at 93.

C. This Court's Precedent Accords With The Framing-Era Understanding

That "fundamental principle," as recognized in this Court's decisions, is no historical anachronism. The Framers wrote the Constitution to manifest the sovereign power of the United States and the States, including the power to enforce their own criminal laws. They would not have understood any common-law rule to preclude such an exercise of sovereignty, let alone silently incorporated such a rule into the document itself. Petitioner's central argument—that the Double Jeopardy Clause implicitly incorporates an asserted common-law

rule under which "prosecution in a foreign country would bar a second prosecution," Br. 13—lacks sound historical foundation and implausibly suggests that the Double Jeopardy Clause empowers foreign governments to bar domestic prosecutions.

1. The Framers did not intend the Double Jeopardy Clause to subordinate domestic law-enforcement power to foreign entities

If the Double Jeopardy Clause in fact incorporated a rule of the sort petitioner posits, then a foreign terrorist could assert a constitutional bar to a federal or state prosecution if a foreign sponsor of terrorism had tried him for the same conduct under an equivalent criminal law. Such a contingent form of sovereignty would have been anathema to the Framers.

a. The Declaration of Independence announced the colonists' determination to free themselves from the tyranny of British rule and to govern themselves as "Free and Independent States" with "full Power" to do all "Acts and Things which Independent States may of right do." Declaration of Independence ¶ 32; see *id.* ¶¶ 1-2. Among other complaints, the Declaration denounced the King for "protecting [armed British troops] by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States." *Id.* ¶ 17.

That passage referred to "the so-called Murderers' Act, passed by Parliament after the Boston Massacre," which "provided 'that any government or customs officer indicted for murder in America could be tried in England, beyond the control of local juries.'" Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 687 n.181 (1996) (brackets and citation omitted). "During the late colonial period, Americans

strongly objected to * * * [t]his circumvention of the judgment of the victimized community." *Ibid.* The Continental Congress, for example, decried the Act as "indemnifying the Murderers of the Inhabitants of Massachusetts-Bay." Address to the Inhabitants of the British Colonies (Oct. 21, 1774), printed in 1 *Journals of Congress* 36, 45, 53 (1777).

b. It would be extraordinary to construe the Double Jeopardy Clause as itself granting Great Britain or other foreign countries the ability to shield murderers of Americans from U.S. prosecution by trying them first. On petitioner's theory, the federal government (through the Double Jeopardy Clause), as well as States (through their common law), would have been precluded from prosecuting a British soldier who murdered or injured Americans, so long as Great Britain had already acquitted him or given him a light punishment under a similarly constructed law.

Petitioner identifies no explicit contemplation by the Framers, either in the text of the Double Jeopardy Clause or any discussion of its adoption, that would support such a near-replication of the pre-independence state of affairs. The Framers plainly viewed the trial and punishment of certain transnational crimes, such as murder of Americans by the British in international waters, as within the purview of the federal government. See U.S. Const. Art. I, § 8, Cl. 10 (granting Congress power to define and punish "Felonies committed on the high Seas"). And this Court itself recognized early on that the United States and Great Britain could independently prosecute such a murder as an offense against the separate laws of each. See *Furlong*, 18 U.S. (5 Wheat.) at 197. The Framers did not surrender that

sovereign right, so soon after securing it, by adopting the Double Jeopardy Clause.

Petitioner appears implicitly to acknowledge the implausibility of that result. He contemplates (Br. 30), for example, that the Court might "reject" his asserted common-law rule insofar as it would bar "successive prosecutions after a foreign acquittal." But a bar on domestic prosecution after a foreign acquittal is the very *definition* of his asserted common-law rule. See, *e.g.*, Pet. Br. 13 (asserting rule under which "prosecution in a foreign country would bar a second prosecution for the same crime"). If petitioner would concede away such a bar, he would concede away his entire historical argument. And if petitioner is in fact proposing a rule under which prosecution by a foreign sovereign would not be preclusive, but prosecution by a domestic sovereign would, he is inventing a new federalism-subverting doctrine for which even he does not claim any historical precedent.

2. Framing-Era law is consistent with a sovereign-specific understanding of the Double Jeopardy Clause

In any event, this Court has correctly rejected the assertion that a "well-established" (Pet. Br. 4) common-law rule precluded successive prosecutions by independent sovereigns. See *Bartkus*, 359 U.S. at 128 n.9, 129-130.

a. Common-law decisions do not support petitioner's asserted foreign-judgment bar

Petitioner and his amici cite no report of any pre-Framing decision that actually applied a foreign criminal judgment to bar a domestic prosecution.

i. The cornerstone of petitioner's common-law argument is *Rex* v. *Hutchinson* (1678), reported in 3 Keb. 785 (1685), which he characterizes as creating a "well-

known *Hutchinson* rule," Br. 14, under which a foreign prosecution forecloses a domestic one. But the only actual report ever cited of a decision in *Hutchinson* suggests, if anything, the opposite. The report states, in its entirety:

> On Habeas Corpus it appeared the Defendant was committed to Newgate on suspicion of Murder in Portugal, which by Mr. Attorny being a Fact out of the Kings Dominions, is not triable by Commission, upon 35 H. 8. Cap. 2. §. I. N.2, but by a Constable and Marshal, and the Court refused to Bail him, & c.

3 Keb. at 785.

The report does not say that Hutchinson was acquitted in Portugal, but if such an issue was raised in the proceeding, it did not allow him to avoid prosecution in England. Far from supporting a rule of complete preclusion, the report makes clear that the court found Hutchinson, who was accused of a murder in Portugal, to in fact *be* "triable * * * by a Constable and Marshal" in England. *Hutchinson*, 3 Keb. at 785; see 4 William Blackstone, *Commentaries* 267 (5th ed. 1773) (explaining that the "earl marshal" and "lord high constable" jointly presided over the "court of chivalry," which had "jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it") (emphasis omitted); Burn 135 (similar).

The court did determine that Hutchinson was not triable in a *different* forum—namely, before a special statutory commission empowered to try defendants for certain extraterritorial crimes. See *Hutchinson*, 3 Keb. at 785 (citing 35 H. 8. Cap. 2. §. I. N.2 (1543-1544)). But because Hutchinson was "triable" in at least one English court, the court in *Hutchinson* "refused to Bail"

him. *Ibid.*; see *Rex* v. *Kimberley* (1729), reported in 2 Strange 848 (1755) (recognizing that Hutchinson remained imprisoned).

ii. Acknowledging that no report of the case supports his asserted "*Hutchinson* rule," Br. 13-14, petitioner views *King* v. *Roche* (1775) as the "most instructive" decision. But neither the holding nor reasoning of *Roche* endorses any "*Hutchinson* rule."

The report of that case at the time of the Framing, see *Captain Roche's Case*, 1 Leach 138 (1789), does not cite or discuss *Hutchinson*. Nor does it reflect any holding that an English prosecution was barred by a foreign judgment. It instead describes the case as addressing a matter of procedure—specifically, the impermissibility of simultaneously adjudicating both a plea of not guilty and a plea of prior acquittal. *Id.* at 138-139. Although Roche's own plea of prior acquittal was based on a foreign judgment, the question whether that judgment would in fact have been a valid bar to Roche's prosecution by special commission—let alone a bar to prosecution by *any* English court—was neither presented nor decided, but was at most simply assumed *arguendo*. Before the prosecution could file its "replication" (*i.e.*, its reply to the defendant's pleas), Roche elected to withdraw his prior-acquittal plea. *Ibid.*; see Jacob 687 (defining "replication"). He was then tried and found not guilty. *Captain Roche's Case*, 1 Leach at 139.

Petitioner's more expansive reading of *Roche* (Br. 13) as expressly endorsing his asserted "*Hutchinson* rule" relies on an annotation that was apparently added by a later case reporter, *after* the Framing. Although the annotation appears in later editions of the reporter

(including the version reproduced in the twentieth-century English Reports cited by petitioner), it did not appear in the 1789 and 1792 versions. See *Captain Roche's Case*, 1 Leach 125 (1792); *Captain Roche's Case*, 1 Leach at 138-139 (1789). As petitioner himself acknowledges, "the Court must * * * look to the 'English practice, *as understood in 1791*.'" Br. 12 (quoting *Grady*, 495 U.S. at 530 (Scalia, J., dissenting)) (emphasis added). And even in the versions of the case positing a foreign-judgment-bar theory that may have motivated Roche's prior-acquittal plea, Roche still withdrew that plea—possibly because he actually viewed it as unavailing—and was subsequently put on trial.

iii. Additional criminal cases cited by petitioner likewise tend, if anything, to cast doubt on his asserted "*Hutchinson* rule." In *Rex* v. *Thomas* (1664), reported in 1 Lev. 118 (1722), a defendant was acquitted of murder in Wales, indicted for the same murder in England, and then discharged due to "the irregularity of Proceedings." *Ibid.* By that time, however, Wales had been "united to the kingdom of England," and an English statute provided that "the laws of England and no other, shall be used in Wales." 1 Blackstone 94-95; see *Thomas*, 1 Lev. at 118. The defendant's trial in Wales was therefore conducted "according to the Laws of England." *Thomas*, 1 Lev. at 118 (emphasis omitted). Because both the Welsh and English courts had "Jurisdiction of the Cause"—*i.e.*, authority to try Thomas for "the same Murder" under *the same law*—a second trial was precluded. William Hawkins, *A Treatise of the Pleas of the Crown* 372 & n.o (3d ed. 1739).

King v. *Aughet*, 13 Cr. App. R. 101 (C.C.A.), is from 1918 and illustrates that no well-established rule existed even then. The appellate court in that case relied

on Aughet's prior Belgian court martial to quash his English conviction, *not* because of any common-law preclusion principle, but because of a specific World War I convention expressly recognizing "the exclusive right of jurisdiction" of each country's courts martial. *Id.* at 105; see *id.* at 109. The appellate court did "not think it necessary to decide" the apparently still-unsettled question "whether an acquittal by a Belgian court-martial could in ordinary circumstances be pleaded as a bar in the English courts." *Id.* at 108.

iv. The remaining decisions on which petitioner relies—*Beake* v. *Tirrell/Thyrwhit* (1688) and *Burrows* v. *Jemino* (1726)—are civil cases, whose discussions of *Hutchinson* are hearsay at best and whose holdings could not and do not support his proposed rule of criminal procedure.

In *Tirrell*, reported in Comberbach 120 (1742), the court *rejected* the defendant's argument that a prior admiralty-law judgment barred a later claim under the law of trover (and conversion), on the ground that the defendant had not pleaded the bar with sufficient specificity. See *id.* at 120-121. Both there and in an earlier adjourned session of the same case—*Beak* v. *Thyrwhit* (1688), reported in 3 Mod. 194 (1725)—the defendant had cited *Hutchinson*. See *ibid.*; *Tirrell*, Comberbach at 120; see also *Beak* v. *Thyrwhit*, reported in 87 Eng. Rep. 124, 125 n.d (1908) (annotation recounting procedural history). According to that defendant, *Hutchinson* had involved Hutchinson's presentation of an official Portuguese judgment of acquittal for murder, after which the judges "all agreed[] That he being already acquitted by their Law, could not be tried again here." *Thyrwhit*, 3 Mod. at 195. The court itself, however, neither endorsed the defendant's characterization of

Hutchinson nor agreed with the defendant that the action against him was barred.

Burrows v. *Jemino*, reported in 2 Strange 733 (1755), and *sub nom. Burroughs* v. *Jamineau*, Mosley 1 (1803), is likewise inapposite. Burrows had been relieved of a debt by a foreign court and sought an injunction against an English suit on the debt. See *Burrows*, 2 Strange at 733. In exercising its equitable discretion to grant the injunction, the Lord Chancellor in *Burrows* cited *Hutchinson*, briefly describing that case as having treated Hutchinson's acquittal (which he thought was Spanish, not Portuguese) as "a good bar to any proceedings here." *Ibid.* But notwithstanding that discussion of equity, the Lord Chancellor went on to recognize that Burrows's favorable foreign judgment would *not* have precluded an English "trial at law" and that Burrows might have lost such a trial before some judges. *Ibid.* He granted the injunction only because he himself would have treated Burrows's foreign judgment as conclusive "evidence" that Burrows was entitled to prevail. *Id.* at 733-734.

Indeed, *Burrows*, *Thyrwhit*, and *Hutchinson* were all cited to the court in another civil case identified by petitioner—*Gage* v. *Bulkeley* (1744), reported in Ridg. t. H. 263 (1794)—which determined that "a foreign sentence * * * *cannot at all* be pleaded in a Court of law." *Id.* at 272 (emphasis added); see *id.* at 267, 279. It found *Hutchinson*, in particular, to be "no proof" that "the sentence or judgment of a foreign Court can be used by way of plea in a Court of justice in England." *Id.* at 270-271; see *id.* at 266-267.

b. Treatises cited by petitioner do not illustrate a universal understanding that foreign prosecutions precluded domestic ones

The treatises cited by petitioner cannot, and do not, supply a "well-established" rule that is absent from the reported decisions themselves.

i. Petitioner errs in suggesting (Br. 14-15) that Blackstone supports his foreign-sovereign-bar interpretation of *Hutchinson*. In describing the common-law pleas that informed the Double Jeopardy Clause, Blackstone explained that "when a man is once fairly found not guilty * * * before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 Blackstone 335. The reference to a "court having competent jurisdiction of the offence" has a footnote citing the report of *Thyrwhit*, 3 Mod. at 194, that describes the arguments made in the adjourned session of that case. Blackstone did not, however, cite *Hutchinson* itself, endorse petitioner's "*Hutchinson* rule," or state that a foreign court would have "competent jurisdiction" over an English criminal offense.

To the contrary, Blackstone's earlier chapter on criminal jurisdiction, which explained that its discussion was informed by double-jeopardy principles, 4 Blackstone 259, discussed only English courts, *id.* at 258-279. His citation of *Thyrwhit*, a case about admiralty and trover, likewise concerned only different strands of English law. See 3 Mod. at 194; pp. 38-39, *supra*. Had Blackstone understood *Hutchinson* to establish that a foreign prosecution would preclude a domestic prosecution for the same conduct, he would have said so directly. See, *e.g.*, 4 Blackstone 209 n.q (citing another case from 3 Keb.). Instead, on the page after he cited

Thyrwhit, Blackstone underscored that for a prior acquittal or conviction to serve as a bar, the subsequent case "must be * * * a prosecution for the same identical act *and* crime." *Id.* at 336 (emphasis added); see *Grady*, 495 U.S. at 530 (Scalia, J., dissenting) (quoting same language from Blackstone, with same emphasis).

ii. The remaining historical sources cited by petitioner and his amici appear to be drawn from a single treatise on evidence—not criminal procedure—namely, Henry Bathurst, *The Theory of Evidence* (1761).[4] Bathurst described *Hutchinson* in a single sentence as having allowed an acquittal (which he, too, thought was Spanish, not Portuguese) to be pleaded as a bar "because a final Determination in a Court having competent Jurisdiction is conclusive in all Courts of concurrent Jurisdiction." *Id.* at 39. That description was apparently then replicated in a discussion of evidence law in Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 245 (5th ed. 1788) (cited at Pet. Br. 15), itself a treatise whose "[c]ompass" explicitly excluded "criminal [p]rosecutions (as such)," *id.* at 198. Buller was then cited in the post-Framing *Roche* annotation cited by petitioner, see 168 Eng. Rep. 169, 169 n.a (1925), as well as other post-Framing treatises cited by petitioner and his amici. See Francis Wharton, *A Treatise on the Law of Homicide in the United States* 283 (1855); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816); 1 Thomas Starkie, *A Treatise on Criminal Pleading* 301

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[4] Two "treatises" cited by amici simply reprint *Burrows*, *supra*. See Law Professors Amicus Br. 4 (citing John Strange, *A Collection of Select Cases Relating to Evidence* 142 (1754), and 2 Timothy Cunningham, *The Merchant's Lawyer* 113-114 (1768)).

n.h (1814); Leonard McNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802).

Bathurst did not purport to define which courts actually had "concurrent Jurisdiction" over particular offenses. And the decision in *Gage*—which explained that *Hutchinson* had involved a special statutory commission for trial of crimes abroad that had discretion, not available in a court at law, to decline a second trial following a foreign one—suggests that even Bathurst may well have viewed such overlap to be limited. See Ridg. t. H. 271-272. This Court, reviewing the history in 1959, itself found *Hutchinson*—as to which the reporting was "confused" and "inadequate"—to be "dubious" precedent that, at most, "reflect[ed] a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus*, 359 U.S. at 128 n.9. Petitioner and his amici have uncovered nothing that proves otherwise.

c. Early state cases do not support petitioner

Even assuming the foreign-judgment bar petitioner posits could in fact be found in one of the places he identifies, the lack of uniformity in early state cases belies any suggestion that the Framers necessarily understood such a bar to be hidden there or silently intended to constitutionalize it.

As this Court observed in *Bartkus*, state decisions were split evenly, and thus "totally inconclusive," on "the validity of successive state and federal prosecutions," before the Court effectively settled the matter in *Fox*. 359 U.S. at 129-131. *Bartkus* also observed that the disagreement potentially "manifest[ed] conflict in conscience," rather than in law, and that two cases suggesting a bar had misunderstood the Court's own decision in *Houston*. *Id.* at 131. Petitioner's contrary view

of the pre-*Fox* state decisions (Br. 17-20) is effectively just a meritless challenge to this Court's reading of two of them.

In *Mattison* v. *State*, 3 Mo. 421 (1834), the Supreme Court of Missouri, in considering a challenge to Missouri's authority to criminalize counterfeiting, *rejected* the State's argument that a defendant convicted under the state statute could "plead this conviction in bar" in a later federal prosecution. *Id.* at 425-426. "To make a former conviction good at common law," the court explained, "the cause of the prosecution must be the same in both actions," and "the judgment of law with regard to the degree or quantity of punishment should be the same also." *Id.* at 426. The court observed that "these coincidents are not likely to happen where the offender and the offense are subject to the separate action of two independent separate wills," and it found that they were not the same in the case before it because the Missouri and federal statutes prescribed different punishments. *Ibid.* The court also expressed concern that, if a state prosecution could bar a later federal prosecution, States could intentionally thwart the enforcement of federal laws with which they disagreed. *Id.* at 427-428.

In *State* v. *Brown*, 2 N.C. 100 (1794)—the earliest case petitioner identifies—the Superior Courts of Law and Equity of North Carolina *relied on* the evident possibility of multiple trials by different States as a reason to construe North Carolina theft law not to apply to a defendant arrested there while riding a horse he had stolen in Ohio. *Id.* at 101-102. The court considered whether, if the defendant "were tried and condemned here, or tried and acquitted here, * * * the sentence of this court [would] be pleadable in bar to an indictment preferred against him in the Territory South of the

Ohio." *Id.* at 100-101. It "th[ought] it would not; because the offence against the laws of this state, and the offence against the laws of that country are distinct; and satisfaction made for the offence committed against this state, is no satisfaction for the offence committed against the laws there." *Id.* at 101.

II. NO SOUND REASON EXISTS TO OVERTURN 170 YEARS OF PRECEDENT INTERPRETING THE DOUBLE JEOPARDY CLAUSE

The correctness of this Court's decisions in itself justifies adhering to them. But even if petitioner had offered some basis for revisiting the long-held understanding of "same offense," no sufficient justification exists for overruling the Court's precedent.

A. Petitioner Has Not Justified Discarding This Court's Long Line Of Decisions Treating Separate Sovereigns' Crimes As Different "Offence[s]"

In numerous decisions since the nineteenth century, this Court has repeatedly recognized that successive prosecutions for the same act by different sovereigns are not prosecutions for the "same offence" under the Double Jeopardy Clause. See pp. 23-31, *supra*. In so doing, the Court has considered and rejected most of the arguments that petitioner and his amici have now disinterred. See, *e.g.*, *Montejo* v. *Louisiana*, 556 U.S. 778, 792-793 (2009) (identifying "the antiquity" and "reason[ing]" of precedent as reasons for retaining it). Petitioner does not dispute (*e.g.*, Br. 31) that, under the doctrine of *stare decisis*, overruling precedent generally requires a "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson* v. *United States*, 530

U.S. 428, 443 (2000)). He provides no sound reason for renouncing the Court's long, consistent, and coherent line of precedent here.

1. Abandoning the sovereign-specific understanding of "offence" would unsettle double-jeopardy law

Petitioner's characterization of the issue in this case as whether to retain a "'separate sovereigns' *exception*" to the Double Jeopardy Clause, *e.g.*, Pet. i (emphasis added), misapprehends the overall coherence of this Court's double-jeopardy jurisprudence. And it accordingly disregards the disruptive effect that overturning the challenged precedents would have.

a. Petitioner contends that "*stare decisis* carries less weight for cases 'decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions.'" Br. 33 (citation omitted). But 29 different Justices of this Court joined the majority opinions in *Fox*, *Lanza*, *Abbate*, and *Heath* alone. And most of the Court's key decisions were either unanimous or drew only one or two dissenting votes. See *Heath*, 474 U.S. at 83 (7-2 decision); *Lanza*, 260 U.S. at 378 (8-0 decision); *Moore*, 55 U.S. (14 How.) at 17, 21 (8-1 decision); *Fox*, 46 U.S. (5 How.) at 432, 435 (8-1 decision).

The Court decided *Bartkus* and *Abbate* by narrower margins, but the dissenting opinions in those cases do not support petitioner's position here. Justice Brennan dissented in *Bartkus* because he believed, based on the record, that the successive state prosecution in that case was puppeteered by federal authorities and thus "actually a second federal prosecution of Bartkus." 359 U.S. at 165-166. Far from disputing the basic point at issue here, Justice Brennan wrote the Court's opinion

in *Abbate*, which was issued the same day. See 359 U.S. at 187, 189.

The other three Justices who dissented in *Bartkus* and in *Abbate* treated the Double Jeopardy Clause as barring at least some successive prosecutions for a single act, irrespective of the law that applied. See *Bartkus*, 359 U.S. at 158 (Black, J., dissenting) (criticizing rule under which "one act becomes two"); *Abbate*, 359 U.S. at 202 (Black, J., dissenting) (criticizing rule under which "identical conduct of an accused might be prosecuted twice"). The Court itself later experimented with a conduct-focused approach, see *Grady*, 495 U.S. at 510, but the experiment was short-lived and repudiated as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy," *Dixon*, 509 U.S. at 704.

The Court's direct rejection of a conduct-focused approach counsels strongly against the mass abrogation that petitioner seeks here. This Court has identified a decision's "consistency with other related decisions" as a factor in considering whether to discard it. *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The precedents at issue here follow logically from basic principles of federalism and the Clause's focus on not only the act, but also the particular law, at issue in a prosecution. See pp. 10-18, *supra*. Petitioner does not offer any meaningful definition of "offence" that would erase the inherent distinction between the laws of independent sovereigns or explain how such a definition could be reconciled with other double-jeopardy doctrines that reflect a sovereign-specific approach to that term. See pp. 18-21, *supra*.

b. Petitioner's failure to provide a coherent definition of "offence" illustrates why it is his approach, not

this Court's precedent, that creates "unworkable doctrinal consequences" (Pet. Br. 48). This Court's precedent is "simplicity itself to apply," *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015), because it eliminates any double-jeopardy issues if prosecutions are by independent sovereigns. Petitioner suggests (Br. 48-49) that the test for independent sovereignty can be difficult to apply, but the Court has already done all the work that is relevant to the vast majority of cases. The Court has made clear that the United States, individual States, and individual Indian tribes are separate sovereigns, while certain territories are not. See *Sanchez Valle*, 136 S. Ct. at 1876-1877; *Heath*, 474 U.S. at 89; *Wheeler*, 435 U.S. at 332; *Waller* v. *Florida*, 397 U.S. 387, 394-395 (1970).

Overruling the Court's precedent, however, would present lower courts with a new and vexing problem—namely, comparing offenses enacted by different legislatures to determine whether they are the "same" in some relevant sense. Contrary to petitioner's passing assertions (Br. 10, 51-52), *Blockburger*'s element-comparison test—which is "a rule of statutory construction" developed "to help determine legislative intent," *Garrett*, 471 U.S. at 778-779—is neither designed for, nor adequate to, that purpose. That "simple-sounding" test "has proved extraordinarily difficult to administer in practice" even when the same legislature has defined both crimes. *Texas* v. *Cobb*, 532 U.S. 162, 185 (2001) (Breyer, J., dissenting). Those difficulties would multiply if courts were required to apply a *Blockburger* analysis to compare the elements of offenses under the laws of different sovereigns—including foreign sovereigns, whose laws may present especially difficult analytical challenges.

Petitioner's own case illustrates the point. Not only do the federal and state firearm offenses have different jurisdictional requirements (which may be relevant for this purpose), see p. 15, *supra*, but also different predicates. Compare 18 U.S.C. 922(g)(1), with Ala. Code § 13A-11-72(a) (2015). For example, a conviction for a felony not formally classified as violent would be a predicate for the federal firearm prohibition but not the Alabama one, while the reverse is true of a prior conviction for certain misdemeanors. Yet petitioner must have in mind some analysis under which the offenses would nevertheless be the "same."

Analysis of another sovereign's law may also raise the question whether statutory alternatives are elements of different offenses or means of committing a single offense, cf. *Descamps* v. *United States*, 570 U.S. 254, 261-263 (2013), and, if the former, whether and how to apply a "modified categorical approach," *ibid.*, like the one used to compare offense elements under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), see *Shepard* v. *United States*, 544 U.S. 13, 19-20 (2005). As experience with the ACCA demonstrates, both the derivation and application of such an analytical framework would present considerable practical difficulties. See *Kimble*, 135 S. Ct. at 2411 (adhering to precedent where "trading in" prior approach for a new one "would make the law less, not more, workable than it is now").

c. The United States, States, and Indian tribes have long relied on the Court's precedent to achieve important law-enforcement goals. For example, overlapping federal prosecutions can help to "stem the tide of domestic violence experienced by Native American women." *United States* v. *Bryant*, 136 S. Ct. 1954, 1960

(2016). To "fill [an] enforcement gap" resulting in part from "patchwork" legal regimes in Indian country, federal law provides for enhanced punishments for recidivist domestic abusers there. *Id.* at 1959-1961 (discussing 18 U.S.C. 117(a)) (citation omitted). Under this Court's longstanding interpretation of "same offence," tribes have been able to immediately enforce their own more limited domestic-abuse laws against a recidivist without concern that doing so will foreclose a later federal prosecution that will provide more appropriate punishment. See *Wheeler*, 435 U.S. at 330-331 (recognizing concerns with treating federal and tribal prosecutions as the "same").

The Court has likewise recognized the "shocking and untoward" results of allowing a limited federal prosecution to preclude a more sweeping state prosecution, *Bartkus*, 359 U.S. at 137, and the similar undesirability of the reverse scenario, see *Abbate*, 359 U.S. at 195. As this Court has explained, "it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses" or to "insure that there would be no state prosecutions for particular acts." *Ibid.* The problems are even worse if the Clause could in fact bar a domestic prosecution following a foreign prosecution, as petitioner contends. Neither the federal government nor the States have any way to ensure that no foreign enemy prosecutes and acquits (or only lightly punishes) someone who commits crimes against United States citizens or interests.

The issue is not limited to future, or even pending, prosecutions. Under well-settled law, law-enforcement authorities from different sovereigns had no double-jeopardy-related reason to insist that they be the first

to prosecute in circumstances where multiple sovereigns' interests were implicated. But were the Court to decide this case in favor of petitioner, they will wish they had been less accommodating. Defendants will undoubtedly challenge long-final convictions by whichever sovereign happened to go second, on the theory that a reversal of course in this case would represent a new retroactive rule. See *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016) (discussing retroactivity). Whether or not that theory is accepted by the courts, the proliferation of collateral attacks would itself undermine expectations reflected in plea agreements, assurances to victims, and otherwise.

2. No intervening developments justify a reinterpretation of "same offence"

Petitioner identifies no intervening development that requires treating the United States, States, Indian tribes, and foreign countries as defining and prosecuting the same legal "offence[s]."

a. Petitioner's reliance (Br. 35-41) on the incorporation of the Double Jeopardy Clause against the States in *Benton* v. *Maryland*, *supra*, is misplaced. The Court in *Heath* reaffirmed its sovereign-specific understanding of the Clause after *Benton*. See pp. 30-31, *supra*. And even putting *Heath* aside, petitioner's incorporation argument is unsound.

Nothing about the sovereign-specific interpretation of the term "offence" rests on a presumption that the Double Jeopardy Clause applies to the United States alone. *Benton* altered neither the text of the Clause nor the independent sovereignty of States and the federal government. Petitioner's examples (Br. 39-40) of scenarios in which this Court has overruled precedent

premised on non-incorporation—like the "silver-platter" doctrine, which addressed interactions of federal authorities who were subject to a constitutional prohibition and state authorities who were not—are inapposite. See *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 77 (1964) (explaining that doctrine had "no continuing legal vitality"); *Elkins* v. *United States*, 364 U.S. 206, 213 (1960) (explaining that doctrine's "foundation * * * disappeared" upon incorporation).

b. Petitioner likewise errs in suggesting that Congress's enactment of additional criminal laws has undercut the "factual premise" of this Court's precedents. Br. 42 (capitalization and emphasis omitted); see *id.* at 42-46. An assumption about the number of federal criminal laws has never been a premise of the Court's interpretation of the Double Jeopardy Clause. To the contrary, although the Court in *Fox* noted its expectation that successive state and federal prosecutions would be rare, it recognized (as did the Court in *Lanza*) that such prosecutions would be valid even if "either probable or usual." 46 U.S. (5 How.) at 435; see *Lanza*, 260 U.S. at 383. The Double Jeopardy Clause, which is not principally directed at the lawmaking authority of legislatures, see *Brown*, 432 U.S. at 165, imposes no cap on the number of criminal laws that Congress may enact pursuant to its enumerated powers.

Petitioner contends (Br. 44-46) that the enactment of more federal criminal laws could result in more cooperation—or, in his words, "collusion"—between federal and state prosecutors. But this Court's construction of the Double Jeopardy Clause does not rest on any assumption that federal and state officials are walled off from one another. The Court has long been aware that

federal-state cooperation is a "conventional practice between the two sets of prosecutors throughout the country." *Bartkus*, 359 U.S. at 123. The Court has reserved the possibility that successive prosecutions might be barred in the rare circumstance where the second sovereign is simply acting as a "tool of" the first. *Ibid.* But "cooperation" in achieving each sovereign's interests does not rise to that level, see *ibid.*, and should be encouraged rather than deterred.

B. The Political Branches Are Best Situated To Address Case-Specific Concerns With Successive Prosecutions

Petitioner's request that this Court adopt a new interpretation of the Double Jeopardy Clause appears largely to be grounded in his view that the longstanding interpretation produces "unfairness." *E.g.*, Br. 6. But any such policy concerns about successive prosecutions by different sovereigns are best addressed in a more fine-tuned manner by the political branches.

1. A successive prosecution by a different sovereign can impose substantial burdens on a defendant and will often be unnecessary. But in certain cases, countervailing factors will counsel in favor of separate sovereign prosecutions. Relevant case-specific considerations can include, for example, whether a defendant expedited a plea in one court knowing that he would receive a much lighter sentence there, see *Wheeler*, 435 U.S. at 330-331, or whether the crime infringes on distinct sovereign interests, see, *e.g.*, *Moody* v. *Holman*, 887 F.3d 1281, 1283 (11th Cir.), cert. denied, 138 S. Ct. 1590 (2018) (state and federal murder prosecutions of defendant who killed federal judge); *United States* v. *Roof*, 252 F. Supp. 3d 469, 470-471 (D.S.C. 2017) (federal prosecution of race-motivated shooting of church parishioners); Indictment Nos. 2015-GS-10-4115 to -4124, *Roof*, *supra* (S.C. Ct. of

Gen. Sessions) (state murder prosecution of same defendant).

Context-specific determinations that a second prosecution is warranted have proved to be important in a variety of circumstances. Overlapping federal prosecution of bank robbery during the Great Depression, for example, cut the crime rate in half. See *Bartkus*, 359 U.S. at 133 n.22. And a bar on successive prosecutions by different sovereigns would have impeded efforts to secure justice for racially motivated crimes during the civil-rights era. See, *e.g.*, Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141, 1165 & n.89 (2003) (discussing federal prosecution, following state acquittal, of a Ku Klux Klan member for murdering an African-American farmhand).

2. The judiciary's refusal to categorically preclude successive prosecutions by different sovereigns reflects a longstanding tradition of leaving such case-specific policy judgments to the political branches, which can balance the competing concerns in a more context-sensitive way. See, *e.g.*, *Heath*, 474 U.S. at 91-93 (rejecting requirement of judicial preapproval for second sovereign's prosecution); see also *Bartkus*, 359 U.S. at 136-137 (describing practices in state courts). Taking up that mantle, some state legislatures have barred successive prosecutions in at least some circumstances. See *Bartkus*, 359 U.S. at 138; 6 Wayne R. LaFave, *Criminal Procedure* § 25.5(b) (4th ed. 2015). Congress has done the same with respect to certain crimes. See, *e.g.*, 15 U.S.C. 80a-36; 18 U.S.C. 659; 18 U.S.C. 2101(a) and (c); 18 U.S.C. 2117; 49 U.S.C. 80501. And prosecutorial discretion is frequently exercised in this area.

The Department of Justice has adopted its Petite Policy on dual or successive prosecutions with the "overriding purpose * * * to protect the individual from any unfairness associated with needless multiple prosecutions." *Rinaldi*, 434 U.S. at 31. The policy sweeps more broadly than the Double Jeopardy Clause, covering any "federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding." *Justice Manual* § 9-2.031(A). It "precludes" such prosecutions unless the prior proceeding left "a substantial federal interest * * * demonstrably unvindicated" and a federal conviction is likely. *Ibid.* And it requires approval from a senior Department of Justice official for such a prosecution to proceed. *Ibid.* Even putting aside the more informal ways in which the policy affects federal decisionmaking, federal prosecutors formally invoked it as a reason for declining more than 1200 prosecutions over a recent eight-year period. See Bureau of Justice Statistics, *Federal Justice Statistics*, https://www.bjs.gov/index.cfm?ty=tp&tid=62 (Statistical Tables for 2006-2013).

Petitioner and his amici may disagree about judgments made under the policy, or with Congress's judgments about what types of conduct should be prohibited by federal criminal law. But a one-size-fits-all judicial reinterpretation of the Double Jeopardy Clause is not the proper tool for dealing with such policy disagreements. "[N]o one should expect (or want) judges to revise the Constitution to address every social problem they happen to perceive," particularly when the "proper authorities, the States and Congress, are empowered to"—and do—"adopt new laws or rules experimenting" with different ways to address the issue. *Currier* v. *Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion).

At the same time, individual courts can, and regularly do, ensure that a defendant is not over-punished by taking account of previous prosecutions by different sovereigns, including other sentences that the defendant has received. See 18 U.S.C. 3553(a); 18 U.S.C. 3584(a); *Setser* v. *United States*, 566 U.S. 231, 236 (2012); *Koon* v. *United States*, 518 U.S. 81, 112 (1996). The district court in this case did just that, by providing that petitioner's sentence for his federal firearm offense would run concurrently with the sentences for his state drug, firearm, and shooting offenses, J.A. 31, thereby effectively punishing petitioner as if he had been prosecuted only for the single federal crime. His violation of state law, as well as federal law, should not entitle him to any special additional leniency.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is recused in this case.

No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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ARGUMENT

Under the original meaning of the Double Jeopardy Clause, a conviction or acquittal by any government with concurrent and competent jurisdiction bars a successive federal prosecution for the same offense—meaning a crime defined by the same elements. That rule is anchored in the text of the Clause, reflected in numerous treatises from the founding era and before, and embodied in English common-law cases. Indeed, so firmly rooted was the rule that the Government identifies not a single example of a successive inter-sovereign prosecution in all of English history, or in all of American history for well over a century after the founding. This Court's separate-sovereigns exception developed long thereafter, was wrong at its inception, and cannot be sustained on the basis of *stare decisis*.

I. THE SEPARATE-SOVEREIGNS EXCEPTION CONTRAVENES THE TEXT OF THE DOUBLE JEOPARDY CLAUSE.

Offenses are defined by their elements. Whether two "offence[s]" are the "same" under the Double Jeopardy Clause is therefore determined by comparing their elements. *See United States v. Dixon*, 509 U.S. 688 (1993) (adopting *Grady v. Corbin*, 495 U.S. 508, 528–29 (1990) (Scalia, J., dissenting)). This elements-based definition is consistent with the constitutional text and original understanding. *Grady*, 495 U.S. at 527–35.

The Government contends that the Double Jeopardy Clause uses "offence" in a sovereign-specific way, to mean "the violation of a particular law of a particular sovereign." Brief for Respondent ("Br.") 10.

But this definition of "offence" would have been foreign to the framers.

1. To the framers, "offence" referred to an act against law, but "law" would have been understood through the lens of common-law and natural-law traditions. In those contexts, it made perfect sense to speak of an "offence" divorced from a "particular law" or "particular sovereign."

Blackstone traces the origins of the criminal law to the inherent power of every man to punish "offences against the law of nature," which is delegated to the sovereign "by the consent of the whole community." William Blackstone, 4 Commentaries on the Laws of England 8 (5th ed. 1773 & Worcester ed. 1790) (hereinafter Commentaries). The Commentaries provide a taxonomy of offenses "against" non-sovereigns, including "Offences Against the Persons of Individuals" (Chapter 15), "Offences Against the Habitations of Individuals" (Chapter 16), and "Offences Against Private Property" (Chapter 17). These include crimes defined by common law as well as by statutes.

The Government's and the *Grady* dissent's dictionaries confirm this understanding, as they state that "[s]ome Offences are by the Common Law," G. Jacob, *A New Law Dictionary* (6th ed. 1750) ("offence"), and that "offence" includes "[a]ny transgression of law, divine or human," 2 N. Webster, *An American Dictionary of the English Language* (1828). Several define "offence" not against a particular law, but "against law," omitting any definite article before "law." Br. 11. And others define "offence" first and foremost as a "crime," that is, "[a]n act contrary to right." 2 T.

Sheridan, *A General Dictionary of the English Language* (1780); Webster, supra.

Other pre-founding sources likewise use "offence" in a non-sovereign-specific manner. A committee of the Continental Congress stated that federal legislation on import duties was necessary because otherwise "thirteen separate authorities" might "ordain various penalties for the same offence." 30 Journals of the Continental Congress 440 (J. Fitzpatrick ed. 1934). A resolution provided that military personnel should not be tried in state court "for the same offence, for which [they] had previous thereto been tried by a Court Martial." *Id.* at v.10, p.72. And a proposed ordinance regarding maritime crimes stated that defendants could "plead a formal Acquittal on a Trial for the same supposed Offences, in a similar Court in one of the other United States." *Id.* at v.29, p.803.

Early Congresses also used "offence" in this way. The Crimes Act of 1790 prohibited offenses like "murder" and "robbery" without defining those crimes, 1 Stat. 112–19, because the framers understood that these offenses had settled common-law definitions regardless of which sovereign had jurisdiction to prosecute. Criminal statutes enacted in 1806 and 1807 provided that states would retain concurrent "jurisdiction, under the laws of the several states, over offences made punishable by this act." 2 Stat. 405; 2 Stat. 424. In other words, same "offences," despite different sovereigns.

2. The Government suggests that its sovereign-specific interpretation of "offence" is justified by other uses of the word in the Constitution, but the opposite is true. The Pardon Clause, which authorizes the

President to grant "pardons for Offences against the United States," U.S. Const. art. II, § 2, cl. 1, only shows that, when the framers wanted to limit "offence" to a specific sovereign, they did so expressly. And the Define and Punish Clause, which empowers Congress to "define and punish . . . Offences against the Law of Nations," U.S. Const. art I, § 8, cl. 10, confirms that an "offence" is distinct from the sovereign and legislation that "define[s]" it. Though "define[d]" by the U.S. Congress, these offenses could fall within the concurrent jurisdiction of multiple sovereigns.

3. In the same vein, the Government does not appear to dispute that at least some offenses prosecuted by different sovereigns can be the "same" for double-jeopardy purposes. In *United States v. Furlong*, 18 U.S. 184, 197 (1820), for example, the Court recognized that double jeopardy would bar successive inter-sovereign prosecution for piratical robbery because it was "an offence within the criminal jurisdiction of all nations." The Government's response—that these are the same offense because the same "source of law defin[es] each crime," Br. 21—cannot be squared with the text of the Constitution, which empowers *Congress* "to *define* . . . Piracies . . . and Offences against the Law of Nations," U.S. Const., art. I, § 8, cl. 10 (emphasis added).[1]

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[1] *Furlong* explained that a plea of *autrefois acquit* based on a U.S. verdict would "be good in any civilized State" as to robbery (because the United States and all nations had concurrent jurisdiction over that offense) but would not be good "in a Court of Great Britain" as to the murder of a *British* subject by a *British* subject on a *British* ship because Great Britain would not recognize U.S. jurisdiction over that murder. 18 U.S. at 197. This

The same held true in *Houston v. Moore*, 18 U.S. 1, 31 (1820). The Government claims that *Houston* is limited to cases in which state courts "imposed state sanctions for violation of a federal criminal law." Br. 22 (emphasis omitted). But Pennsylvania enacted and enforced *its own* criminal statute, which prohibited the refusal to serve in the militia and provided a list of penalties copied from federal law. 18 U.S. at 24.

4. The Clause's drafting history—in particular, the rejection of Representative Partridge's proposal to add "by any law of the United States" following "same offence"—also refutes the Government's interpretation. Pet. Br. 10. The Government argues that the Partridge amendment was intended to "ensure that the Clause be construed to bar only a second trial sought by the government, and not one sought by the defendant as a remedy for a claim of error." Br. 13. But it is unclear how the proposed language could have had that effect. The Government appears to conflate the discussion of two separate proposed amendments, as the concern it mentions was addressed by a different proposal (by Representative Benson) that was rejected before Partridge introduced his. 1 Annals of Cong. 753 (1789).

The Government further speculates that the Partridge amendment was rejected as unnecessary because "it was already understood" that the Bill of Rights "was directed at the federal government alone." Br. 14. But that argument elides two distinct issues: which government the Clause applies to and what

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precisely describes the English rule, which barred a second prosecution after an acquittal "before any court having competent jurisdiction of the offence." Blackstone, Commentaries 335.

prior prosecutions it covers. The Clause could (and did) apply only to the United States, yet still bar federal prosecution after state prosecution for the same offense.

5. The Government's statute-specific reading of the text is also inconsistent with this Court's elements-based understanding of the Double Jeopardy Clause. Under *Blockburger*, "same offence" is not limited to a "particular law." Br 10. Two distinct laws frequently constitute the same offense, so long as their elements are the same. That is true even for laws enacted by governments that function as separate sovereigns. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) (territories); *Waller v. Florida*, 397 U.S. 387, 391 (1970) (home-rule municipalities). The Government's interpretation of "offence" cannot account for these results.

The Government nevertheless insists that the elements test cannot be applied to laws promulgated by different legislatures because *Blockburger* turns on "whether the legislature ... intended that each violation be a separate offense." Br. 19 (quoting *Garrett v. United States*, 471 U.S. 773, 778 (1985)). But the Government's quote comes from a section of *Garrett* addressing whether there was "statutory authorization for a subsequent prosecution," not whether the subsequent prosecution was constitutional. *Id.* at 778. When *Garrett* addressed the constitutional question it said nothing about legislative intent. *Id.* at 786. And for good reason: The Double Jeopardy Clause is a restraint on the political branches; a legislature cannot write it out of the Constitution by simply proclaiming that all

offenses, even those with the same elements, are "different."[2]

In all events, a legislative-intent test is incompatible with the original understanding of the word "offence." At the time of the framing, "offence" covered common-law crimes. Blackstone, Commentaries 194. And a legislative-intent-based reading of "offence" makes no sense where no legislature was involved. *Id.* at 335–36 (discussing *autrefois acquit* and *convict* using common-law crimes and saying nothing about legislative intent).[3]

6. Lastly, the Government asserts that if "offence" were not sovereign-specific the framers "would have used a term like 'conduct' or 'acts,' not 'offence.'" Br. 14. But a same-elements test is not a same-conduct test.

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[2] *Blockburger* developed as a "rule for determining whether Congress intended to permit cumulative punishment" in a single trial. *United States v. Woodward*, 469 U.S. 105, 108 (1854) (*per curiam*). But when used to determine whether the Double Jeopardy Clause bars successive prosecutions, the test is independent of legislative intent. *See Grady*, 495 U.S. at 517 n.8; *Dixon*, 509 U.S. at 704 (adopting the "proofs . . . set forth at length in the *Grady* dissent" that English common law applied an elements test); *see also id.* at 699 (opinion of Scalia, J.) (applying *Blockburger* to find that statutory violation and judicial contempt were the same offense).

[3] The doctrine of issue preclusion does not support the Government's sovereign-specific reading, either. Br. 20. That doctrine is a limited and much-criticized gloss on the constitutional text—developed nearly two centuries after the framing—based on rules of civil law pursuant to which parties typically need to be the same in both proceedings. *See United States v. Mendoza*, 464 U.S. 154, 157–60 (1984); *see also Currier v. Virginia*, 137 S. Ct. 2144, 2152 (2018) (plurality op.).

II. THE SEPARATE-SOVEREIGNS EXCEPTION CONTRAVENES THE ORIGINAL MEANING OF THE DOUBLE JEOPARDY CLAUSE.

1. On original understanding, the Government's brief is more notable for what it omits than for what it includes. The Government presents no affirmative evidence that English common law embraced successive inter-sovereign prosecutions for crimes with the same elements. It cites not a single treatise, English case, or founding-era American case endorsing the separate-sovereigns exception. And it identifies no practice of successive inter-sovereign prosecutions at any point in English history, or in America for nearly a century after the founding. This Court's 1922 decision in *Lanza* is the earliest case the Government cites in which a federal prosecution followed a state prosecution for a crime with the same elements. The earliest such lower court case of which we are aware occurred in 1884. *See United States v. Barnhart*, 22 F. 285, 290–92 (C.C.D. Or. 1884). If the founding generation believed that the Double Jeopardy Clause permitted duplicative prosecutions by separate sovereigns, prosecutors surely would have employed them. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring in part) (failure to exercise a power is evidence that the power was thought unconstitutional).

2. And there is a mountain of affirmative evidence cutting the other way. Indeed, the treatises could not be more clear:

> [A]n acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England.

2 L. MacNally, The Rules of Evidence on Pleas of the Crown 428 (London ed. 1802); 1 T. Starkie, A Treatise on Criminal Pleading 301 n.h (1814) (same); F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius 245 (5th ed. 1788) (same).[4]

Blackstone confirmed the concurrent-jurisdiction rule, explaining that an acquittal "before *any court having competent jurisdiction* of the offence" can be pleaded in "bar of any subsequent accusation for the same crime." Blackstone, Commentaries 335 & n.j. (emphasis added). In support, Blackstone cited *Beak v. Thyrwhit*, (1688) 3 Mod. 194 (K.B.), in which the reporter explained that Mr. Hutchinson "killed Mr. Colson in Portugal, and was acquitted there of the murder," and that "the Judges" of the King's bench "all agreed that he, being already acquitted by their law, could not be tried again" in England. 3 Mod. at 195.

The Government cites no definition of "competent jurisdiction" that would exclude foreign courts. It quibbles that Blackstone should have referred to them "directly," Br. 40, but, particularly given the citation to *Beak*, Blackstone's meaning was clear. The only double-jeopardy reference in *Beak* was *Hutchinson*. And Blackstone's separate statement that double jeopardy applies only if the second prosecution is for

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[4] The Government's suggestion that the law was "still-unsettled" into the 20th century is not a serious argument. Br. 38. *See* ALI, Administration of the Criminal Law, Official Draft: Double Jeopardy 129 (1935) ("England—If a person has been acquitted in a court of competent jurisdiction for an offense in another country he may not be tried for the same offense again in an English court."); J.A.C. Grant, *Successive Prosecutions by State and Nation*, 4 UCLA L. Rev. 1, 11–12 (1956).

"the same identical act *and* crime," Br. 41, simply confirms that Blackstone used an elements-based definition of "crime." Commentaries 335–36 & n.j. It beggars belief that Blackstone could have had a legislature-specific definition in mind when he wrote of common-law crimes.

As for the other treatises, the Government says they are meaningless because they trace to "a single treatise on evidence." Br. 41–42. That does nothing to undermine the relevant point: that the concurrent-jurisdiction rule was "widely cited and universally accepted" as English law at the founding. Grant, *Successive Prosecutions*, *supra*, at 9. This is exactly the kind of evidence relied upon in Justice Scalia's *Grady* dissent—but more. *See* 495 U.S. at 527–35 (relying on five English treatises and two English cases).

3. The Government next undertakes its own novel reading of the English cases.

The Government relies on a report from the bail phase of *Hutchinson*, which it claims shows that Hutchinson's plea of *autrefois acquit* did not bar a second prosecution in England because Hutchinson was deemed "triable" in another English court and denied bail. Br. 35.

But the Government tells only half the story. The Government's report is from an earlier phase of the case and "gives only a brief entry as to the denial of bail." Grant, *Successive Prosecutions*, *supra*, at 9 n.32. Indeed, the report simply did not address the double-jeopardy issue. It instead dealt only with a jurisdictional issue, which under English common-law procedures was addressed before a plea in bar like

autrefois acquit. Starkie, *supra*, at 292 (explaining that only "[a]fter a plea to the jurisdiction [was] overruled," would the defendant raise a plea like *autrefois acquit*). The subsequent opinion on the *autrefois acquit* plea was not reported. Grant, *Successive Prosecutions*, *supra*, at 9 n.32; M. Friedland, Double Jeopardy 362 (1969).

The Government would apparently have this Court believe that all of the English sources discussing *Hutchinson* fabricated out of whole cloth the acquittal in Portugal, the plea of *autrefois acquit*, and even the name of the victim ("Colson"). They then somehow conflated the jurisdictional issue in the bail report with the double-jeopardy rule that an acquittal in Portugal meant Hutchinson "could not be tried again for it in England." *King v. Roche*, (1775) 1 Leach 160, 160–61 n.a (3d ed. 1800) (K.B.). That is absurd and, even if conceivably true, irrelevant. The point is that at the time of the founding the concurrent-jurisdiction rule was widely reported to be a principle of English law.

In addition, *Roche* unequivocally describes the concurrent-jurisdiction rule as barring a second prosecution "in England" after a foreign acquittal. *Id.* It is true that the explanatory footnote discussing *Hutchinson* was not added until the 1800 report. 1 Leach 160 (3d ed.). But *Roche*'s footnote explained what would have already been clear from the case and treatises—that if the jury had believed Roche's evidence about a prior acquittal at the Cape of Good Hope, and made a "finding" "for the petitioner" on that question of fact, "that finding would be a bar" to a

prosecution in England. *Id.* at 160.[5] Regardless, this Court has often relied on post-ratification sources as a reflection of the law as understood at the time of ratification, including in the double-jeopardy context. *See Grady*, 495 U.S. at 530–33 (Scalia, J., dissenting) (relying on 1796 English case and three post-ratification English treatises); *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (citing 1825 treatise); *Crawford v. Washington*, 541 U.S. 36, 47 (2004) (citing "[e]arly 19th-century treatises" confirming an English rule).

Burrows and *Beak* likewise report the concurrent-jurisdiction rule. *Burrows* explained that Hutchinson was acquitted in Spain and "indicted again for the same murder here, to which indictment he pleaded the acquittal in Spain in bar, and the plea was allowed to be a good bar to any proceedings here." *Burrows v. Jemino*, (1726) 2 Strange 733, 733 (K.B.).[6] And *Beak* reported the facts and holding of *Hutchinson*. *Beak*, 3 Mod. at 195. The civil-law holdings in those cases are beside the point.

Rex v. Thomas (1664) also supports the concurrent-jurisdiction rule, even though England ruled Wales at

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[5] The prosecutor would have had no reason to submit the plea in bar to a jury if a plea of foreign acquittal were invalid as a matter of law. Roche withdrew that plea presumably to establish his innocence; also, establishing prior foreign acquittal involved a difficult evidentiary burden. *See* Starkie, *supra*, at 299–300 & n.h.

[6] The reference to Spain is unsurprising; the Spanish king ruled Portugal for decades during the 16th and 17th centuries. *See* David Birmingham, Concise History of Portugal 34–35 (3d ed. 2018).

the time. 1 Keb. 663 (K.B.). To determine whether a lawmaker is a separate sovereign, this Court looks to the entity's oldest source of authority. *United States v. Lara*, 541 U.S. 193, 210 (2004). The original source of Welsh sovereignty was not England; rather, Wales was originally "an absolute and undependent Kingdom." 1 Keb. 663.

Finally, *Gage v. Bulkeley* (1744) was a civil case from the court of chancery holding that a foreign judgment could be used as evidence in an English court. Ridg. t. H. 263, 271–74. In discussing *Hutchinson*, the court confused the double-jeopardy issue with the jurisdictional issue from *Hutchinson*'s bail report. *Id.* at 271–72. For example, the court claimed that Hutchinson could not have "pleaded" his foreign acquittal because he had not yet been indicted at the time of the bail decision. *Id.* In any event, to the extent *Gage* casts doubt, it is an outlier. The overwhelming weight of authority reported the concurrent-jurisdiction rule as stated in *Roche*, *Burrows*, *Beak*, Blackstone, MacNally, Starkie, and Buller.

4. Turning to American sources, the Government cites not a single early treatise supporting the separate-sovereigns exception. Early state cases, too, overwhelmingly rejected inter-sovereign successive prosecutions. *Bartkus v. Illinois*, 359 U.S. 121, 158–59 & nn.18–20 (1959) (Black, J., dissenting). The Government casually dismisses this near-universal understanding because a few opinions disagree over the rationale. Br. 43. But that is like rejecting incorporation because some ground it in the Due

Process Clause and others in the Privileges or Immunities Clause.

In any event, while the Government insists the state cases are "split evenly," it discusses only two, *State v. Brown*, 2 N.C. 100 (1794), and *Mattison v. State*, 1834, 3 Mo. 421 (1834). Br. 43. Both held that the state lacked concurrent jurisdiction over a criminal offense, and both relied on the universal condemnation of successive prosecutions. *Brown*, 2 N.C. at 101; *Mattison*, 3 Mo. at 426. Indeed, *Brown* found the concept of dual prosecutions by separate sovereigns to be "against natural justice." *Brown*, 2 N.C. at 101. *Mattison*, for its part, suggests that a prosecution by a separate sovereign *would* bar a second prosecution if the ordinary requirements were met—*i.e.*, if both the "cause of the prosecution" and the "degree or quantity of punishment" were the same. 3 Mo. at 426. Because the court believed that was "not likely to happen" frequently, it held that the state court lacked concurrent jurisdiction over the offense. *Id.*

5. The Murderer's Act and the Declaration of Independence do not support the Government, either—for much the same reasons as its "foreign terrorist" hypothetical is absurd. Br. 32. The "mock Trial" the Declaration complained of—like a foreign sponsor of terror's trial of a foreign terrorist—is a sham prosecution, to which double jeopardy would not apply even assuming the crimes involved the same elements. Declaration of Independence ¶ 32; *see Bartkus*, 359 U.S. at 161 (Black, J., dissenting); David Rudstein, Double Jeopardy 107–10, 120–21 (2004). Moreover, nothing requires American courts to accept a foreign prosecution by a belligerent country, much

less a "mock Trial" by one; the concurrent-jurisdiction rule applies only where the second government recognizes the competent jurisdiction of the first, *see Furlong*, 18 U.S. at 197, as our federal and state governments do for one another. Finally, by 1789 the concern was the opposite of the Murderer's Act: A key reason for ratifying the Constitution was to ensure the federal government would "uphold[] the rights of foreign sovereigns under the law of nations," particularly regarding offenses committed by Americans "*against* British subjects." Anthony Bellia & Bradford Clark, The Law of Nations and the United States Constitution 11–12 (2017) (emphasis added).

III. THE SEPARATE-SOVEREIGNS EXCEPTION IS INCONSISTENT WITH PRINCIPLES OF FEDERALISM.

As a practical matter, the separate interests of the state and federal governments mean that state and federal crimes will often be different offenses under *Blockburger*. Perhaps for that reason, all evidence suggests that inter-sovereign successive prosecutions are rare. [7] But where a state and the federal government do seek to prosecute the same offense, federalism is not a reason to cast aside the ancient prohibition on double prosecutions.

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[7] The Government issues about 150 Petite Policy authorizations annually. *See* Adam H. Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts § 1.04 p.8 & n.13 (2001). Those relying on the separate-sovereigns exception are presumably fewer, given that the "policy sweeps more broadly than the Double Jeopardy Clause." Br. 54.

1. This case is about the Fifth Amendment's limit on *federal* power. And for the framers of the Fifth Amendment the concern was an overreaching federal government, one that would impinge on state authority and trample individual rights. *See* Federalist 45 (Madison). That is why they insisted on a Bill of Rights—"to guard against the abuse of power" and "encroachments of the general government." *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833). The notion that the federal government would step in and prosecute a defendant after a state jury acquitted him of the same offense would have shocked the founding generation. In contrast, the framers would not have worried that the Double Jeopardy Clause would impinge on state sovereignty because the Bill of Rights did not apply to the states. *Id.*

2. Besides, fully enforcing the original understanding of the Fifth Amendment's Double Jeopardy Clause would enhance state sovereignty, as it would force the federal government to respect the finality of state proceedings. *See Engle v. Isaac*, 456 U.S. 107, 127 (1982) (noting importance of finality of state criminal judgments). The facts here illustrate the point. The State of Alabama decided that Mr. Gamble was best punished through a prison term, probation, and work release. *See* Br. 4. But federal officials disregarded the State's decision and re-prosecuted him. *Id.* at 5. Properly applying the Double Jeopardy Clause would advance both Alabama's sovereign prerogatives and Mr. Gamble's individual rights—showing, as this Court has oft observed, that federalism and liberty walk hand-in-hand.

3. But what about cases where state prosecution follows a federal proceeding? If the Court takes up that Fourteenth Amendment question in this case, it should reject any suggestion that incorporation watered down the original understanding of the Fifth Amendment. If anything, incorporation provides an *additional* reason to overrule the separate-sovereigns exception: With state and federal governments equally bound by the Double Jeopardy Clause, they cannot be allowed to accomplish together what they could not accomplish alone. *See Elkins v. United States*, 364 U.S. 206 (1960); *Murphy v. Waterfront Comm'n of N.Y.*, 378 U.S. 52, 55 (1964).

Neither the Government nor its *amici* cite actual evidence that barring successive state prosecutions would inhibit state law enforcement. They identify no example of a successive state prosecution during the early years of the Republic, and it is difficult to believe that a practice unheard of at the founding is essential to state sovereignty. Even today, the vast majority of criminal cases are state cases, so fully enforcing the Double Jeopardy Clause could not bar more than a tiny fraction of state proceedings. *See* ABA Task Force, https://bit.ly/2CSvao2. Plus, the sky has not fallen in the many states that allow prosecutions by home-rule municipalities or that depart from the separate-sovereign exception as a matter of state law.

IV. *STARE DECISIS* PRESENTS NO OBSTACLE TO OVERRULING THE SEPARATE-SOVEREIGNS EXCEPTION.

The Government offers little in the way of a *stare decisis*–based defense. What the Government does say misses the point.

A. Overruling the Exception Would Not "Unsettle" Double-Jeopardy Law.

1. The Government begins its *stare decisis* argument by counting noses. Br. 45. The fact remains, however, that no rule of constitutional law has been more uniformly criticized—by Justices of this Court, lower-court judges, and scholars—than the separate-sovereigns exception. *See* Pet. Br. at 33–35 & nn.1–2. Indeed, the Government cites nary a student note supporting the doctrine.

That some Justices have joined opinions applying the exception does nothing to show that overruling it would "unsettle" double-jeopardy law. The Government cites *Janus v. American Fed'n of State, C'ty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018), for the principle that "consistency with other related decisions" is a factor supporting *stare decisis*. Br. 46. But the only "related" doctrine the Government appears to have in mind is an elements-based, rather than conduct-based, interpretation of "offence." Again, however, the suggestion that overruling the separate-sovereigns exception somehow entails a conduct-based interpretation of "offence" is a strawman.

2. The Government's suggestion (Br. 46-47) that *Blockburger* would be unworkable without the separate-sovereigns exception is mystifying. If it is workable for state-state or federal-federal prosecutions, it is workable for state-federal prosecutions. The judicial exercise of comparing elements is identical. And none of the supposed difficulties in application the Government highlights are unique to the inter-sovereign context.

The Government's citation of Petitioner's own case in support of its apparent critique of *Blockburger*, Br. 48, is rich in light of its forfeiture (at least thrice over) of any argument that Petitioner's offenses do not qualify as the "same" under *Blockburger*. For that reason, the *Blockburger* question has never been briefed or argued in this case. But its resolution would pose no intractable problems. Courts look to the predicate offense at issue in comparing offenses with multiple potential predicates. *See Whalen v. United States*, 445 U.S. 684, 694 (1980); *see also, e.g., United States v. Hodge*, 870 F.3d 184, 195 (3d Cir. 2017) (applying this principle where defendant faced firearms charges under federal and Virgin Islands law).[8]

3. The Government's suggestion that prosecutors have "relied" on the separate-sovereigns exception is not a legitimate "reliance" argument. Reliance interests can justify retaining faulty precedents in "cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). But this case could hardly have less to do with those sorts of interests. Indeed, this Court has "never" done what the Government asks here: "rel[y] on *stare decisis* to justify the continuance of an unconstitutional police practice." *Arizona v. Gant*, 556 U.S. 332, 348 (2009).

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[8] The Government has no authority for the proposition that Alabama territorial limitations create an additional non-statutory element for *Blockburger* analysis. Br. 15. Regardless, non-substantive jurisdictional requirements ought not "count." *United States v. Gibson*, 820 F.2d 692, 698 (5th Cir. 1987); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016); *but see United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995).

Regardless, the law-enforcement interests the Government attempts to cast in reliance terms are overblown. *Blockburger* is oft-characterized as under-protective because rarely do two offenses qualify as the "same." *Cf. United States v. Johnson*, 462 F.2d 423, 426 (3d Cir. 1972). Given that, and given the breadth of federal criminal law, it is difficult to imagine a scenario in which an alternative charge would not be available. The Government identifies no apparent enforcement difficulties for those states that already prohibit successive state prosecutions. *See* Pet. Br. 50–51 nn.3–5. Nor does it point to any difficulties involving home-rule municipalities or territories that are functionally separate sovereigns. *See Waller*, 397 U.S. at 391; *Sanchez Valle*, 136 S. Ct. at 1870.

4. That reversing here could conceivably result in challenges to other unconstitutionally duplicative convictions gives no reason for pause. The possibility assumes what the Government nowhere concedes: that a decision overruling the separate-sovereigns exception would apply retroactively. Besides, if duplicative prosecutions have been as unusual as the Government suggests, *see* Br. 54, a "proliferation of collateral attacks" seems hardly likely, *id.* at 50. More important, the possibility that vindicating Mr. Gamble's constitutional rights might result in overturning other unconstitutional convictions is no reason for this Court—which the framers tasked with checking Executive excess and vindicating individual rights—to stand idly by.

B. The Foundation of the Separate-Sovereigns Exception Has Eroded.

The Government does not dispute what this Court has repeatedly held: that divergence from *stare decisis* is appropriate when "subsequent decisions of this Court" have "eroded" a decision's legal or factual "underpinnings." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). And its brief does nothing to undermine Petitioner's account of why both are true here. Pet. Br. 35–46.

1. As for doctrine, Petitioner's brief showed that the inapplicability of the Double Jeopardy Clause to the states was the separate-sovereign exception's foundational premise and repeated justification. *See id.* at 35–38. Indeed, the very first decision to suggest that separate sovereigns might be able to engage in duplicative prosecutions, *Fox v. Ohio*, expressly cited non-incorporation as a rationale. 46 U.S. 410, 434 (1847) (the Clause does not bar duplicative prosecutions because it was "exclusively [a] restriction[ ] upon federal power"). The Court relied on non-incorporation again in *United States v. Lanza*. 260 U.S. 377, 382 (1922) ("applies only to proceedings by the Federal Government"). And then again in *Bartkus*, 359 U.S. at 124, and *Abbate v. United States*, 359 U.S. 187, 194 (1959). To be sure, the Court continued to apply the by-then settled rule after incorporation, including in *Heath v. Alabama*, 474 U.S. 82, 89 (1985). But the question whether to overrule the separate-sovereigns question was not presented in *Heath*. *See* Pet. Br., *Heath*, 474 U.S. 82. Nor was the Court even presented with evidence of original meaning. *See id.* Until now, the Court has never had

a full and fair opportunity to determine the original scope of the Double Jeopardy Clause—and certainly has not had occasion to do so since incorporation. *See* Pet. Br. 38.

Incorporation is exactly the sort of jurisprudential shift this Court has recognized justifies a departure from *stare decisis*. *Elkins* overruled the silver-platter doctrine, which was premised on the Fourth Amendment's inapplicability to the states, once that "foundation . . . disappeared." 364 U.S. at 213. And *Murphy* overruled a separate-sovereigns exception to the privilege against self-incrimination, which was premised on that privilege's inapplicability to the states, because incorporation "necessitate[d] a reconsideration." 378 U.S. at 57. The Government's one-sentence dismissal of these precedents as "inapposite," Br. 51, is, well, inapposite. Because *Fox*, *Lanza*, and *Abbate* expressly relied on a non-incorporation rationale, incorporation provides grounds for the Court to revisit the doctrine, just like in *Elkins* and *Murphy*. Indeed, that the Government declines to defend the *Barron*-ial logic of *Fox*, *Lanza*, and *Abbate* is itself a reason to depart from *stare decisis*. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished.").

2. The multiplication of federal criminal laws far beyond the bounds of what *Fox* and *Lanza* anticipated provides yet another basis for departing from *stare decisis*. In both cases, the Court was "almost certain" that duplicative prosecutions would be incredibly rare. *Fox*, 46 U.S. at 435; *Lanza*, 260 U.S. at 383. But the

dramatic expansion of federal law—which *Elkins* and *Murphy* both cited in overruling precedents issued in reliance on the limited scope of federal criminal jurisdiction—upended that expectation.

The Government has no real response. Petitioner, of course, has never argued that "[t]he Double Jeopardy Clause . . . imposes" any "cap on the number of criminal laws that Congress may enact." Br. 51. The point is that the Courts that adopted the separate-sovereigns exception could not have anticipated these "far-reaching systemic and structural changes." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

C. Punting to the Political Branches Is Not An Appropriate Response to the Persistent Violation of Individual Constitutional Rights.

It is no answer to suggest that the political branches are competent to right this constitutional wrong.

The Petite Policy and judicial sentencing discretion—the Government's preferred political alternatives—are cold comfort to the defendant who has "previously been indicted, tried, and acquitted of the precise state crime" for which he is later tried in federal court. *United States v. Frumento*, 563 F.2d 1083, 1099 (3d Cir. 1977); *see also, e.g., United States v. Angleton*, 221 F. Supp. 2d 696 (S.D. Tex. 2002), aff'd 314 F.3d 767 (5th Cir. 2002) (re-prosecution of murder following a state jury's acquittal); *United States v. Basile*, 109 F.3d 1304, 1306 (8th Cir. 1997) (similar).

And, as this case demonstrates, neither safeguard is effective. The Government nowhere explains why this case involves "a substantial federal interest," as

the Petite Policy requires. *Justice Manual* § 9-2.031(A). And if "a senior Department of Justice official" in fact approved Petitioner's prosecution on that ground, Br. 54, it is difficult to see how any criminal defendant could be told to rely on prosecutorial discretion, delineated by an unenforceable policy manual, to vindicate his constitutional rights. Likewise for sentencing discretion. The fact that Petitioner's federal sentence was set to run concurrently with his state sentence does not solve the problem: He remains in prison today because a federal court decided to impose a longer sentence than the one he had already received from a state court for the same offense.

CONCLUSION

The Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause and reverse the judgment below.

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November 21, 2018

No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

Pursuant to Supreme Court Rules 28.4 and 28.7, the State of Texas, on behalf of a 36-State coalition of amici (collectively, the amici States), respectfully requests that the Court expand the time allotted for oral argument in order to allow the undersigned ten minutes of argument time. This case implicates the States' core sovereign interests in combating crime and punishing those who offend their laws. As set out in the amici States' brief, those interests are parallel to, yet also distinct from, those of the United States. *See Abbate v. United States*, 359 U.S. 187, 195 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959). Amici States are uniquely positioned to represent and defend their interests before this Court.

The United States does not oppose expanding the argument time to allow for ten minutes of argument by the amici States and a corresponding additional ten minutes of argument time for petitioner. Counsel for petitioner indicated that he opposes this motion.

* * *

Amici are 36 States, including the 15 most populous States, and amici collectively represent over 86 percent of the country's population. The amici States' elected leaders span the political spectrum, but the amici States are united in this case by their common interest in maintaining their inherent sovereign authority—which includes the power to prosecute offenses.

The amici States' interests are distinct from, yet complementary to, those of the United States. This Court has long recognized the States' inherent power to define and enforce criminal law. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982). This case implicates that power. Petitioner asks the Court to abolish the centuries-old doctrine of separate sovereigns. That request, if accepted, could alter States' ability to prosecute crime that occurs within their jurisdiction.

The effect of the ruling that petitioner seeks would impact the amici States differently than the United States. Petitioner's arguments, if accepted, would mean that a prior prosecution by *any* sovereign would render a subsequent prosecution by another sovereign invalid under the Double Jeopardy Clause. A central premise of petitioner's argument is that overturning over a hundred years' worth of dual-sovereignty precedent would not be disruptive because state and federal governments can cooperatively decide which entity will prosecute. *E.g.*, Pet. Br. 41-44. But that purported solution is cold comfort to the States. For instance, even if there is some degree of overlap between state and federal criminal jurisdiction, this Court has long recognized that a State's interest in vindicating its sovereign authority through enforcement of its laws generally cannot "be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Moreover,

eliminating dual sovereignty would jeopardize States' ability to prosecute in the face of prosecution by a foreign country. Unlike the federal government, States have no real ability to engage in direct diplomacy with foreign powers with respect to criminal matters.

The Court has regularly allowed States to appear and present oral argument as amici curiae where state-sovereignty issues are presented or where States have a valuable perspective distinct from the petitioner or respondent. *See, e.g.*, *Sturgeon v. Frost*, No. 17-949 (S. Ct. 2018) (granting leave to Alaska); *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (Kansas); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Texas); *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (New York); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (New York); *Halbert v. Michigan*, 125 S. Ct. 1822 (2005) (Louisiana); *Clingman v. Beaver*, 125 S. Ct. 825 (2005) (South Dakota); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 457 (2004) (Alabama); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 901 (2004) (Ohio); *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972) (California). That is true here.

The amici States' participation in argument would be particularly appropriate in this case in light of how the separate-sovereignty doctrine has been shaped by the Court. Two of the principal cases that petitioner seeks to overrule—*Abbate*, 359 U.S. 187, and *Bartkus*, 359 U.S. 121—were heard and decided together as companion cases. Like this case, *Abbate* concerned a federal prosecution following a state prosecution. By contrast, *Bartkus* concerned a state prosecution following a federal prosecution. The two cases thus allowed the Court to hear from both the federal government and the States. By happenstance, the issue in the present case arises in the context of a subsequent federal prosecution. But peti-

tioner's arguments against the separate-sovereignty doctrine do not turn on the unique feature of that arrangement; his arguments apply to *any* subsequent prosecution by *any* separate sovereign. Before the Court takes the momentous step of discarding over a hundred and fifty years of precedent recognizing the sovereignty-specific nature of a Double Jeopardy Clause "offense," the Court should, as in *Abbate* and *Bartkus*, have the benefit of hearing from both the federal government and the States.

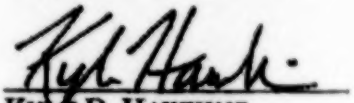
Petitioner would suffer no prejudice from the amici States' participation in oral argument of this case. The amici States consent to a corresponding 10-minute expansion of time for petitioner, should petitioner request that expansion, so that argument time allotted to the two sides would remain equal. That slight expansion is workable, as this is the only case scheduled for argument on December 5, 2018.

The amici States respectfully submit that they can offer the Court a helpful, valuable perspective that is distinct from that of the United States. They further submit that the Court's resolution of this case would benefit from the amici States' participation at oral argument. *See* Sup. Ct. R. 28.4. The amici States therefore respectfully request that they be allotted ten minutes of argument time to advocate for the States' weighty interests in retaining the separate-sovereignty doctrine.

CONCLUSION

The amici States respectfully request that the Court grant the motion to participate in oral argument and for ten minutes of argument time.

Respectfully submitted.



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NOVEMBER 2018

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-646

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE OF THE UNITED STATES TO AMICI STATES' MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

As the United States' brief illustrates, petitioner's challenge to this Court's longstanding interpretation of the Double Jeopardy Clause presents a question of great importance to the federal government. A full 30 minutes of argument time is necessary for the United States adequately to address the numerous aspects of the Double Jeopardy Clause's text, history, and application that petitioner would put at issue, as well as the serious practical consequences of his position. See Gov't Br. 6-55. The United States does not oppose an expansion of argument time to allow for argument by the amici States, whose law-

enforcement interests are also implicated by this case, and corresponding additional argument time for petitioner. The United States does, however, oppose any suggestion that its own argument time be reduced. Cf. Pet. Resp. 3.

Respectfully submitted.

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NOVEMBER 2018

No. 17-646

In The Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

RESPONSE IN OPPOSITION TO AMICI'S MOTION TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

The motion of the amici states for argument time should be denied. First, this case does not present the question amici raise. Second, amici's arguments are adequately presented in their brief. Third, amici lack any justification for requesting expanded argument time, rather than divided argument time; indeed, Respondent's apparent refusal to share its own time speaks volumes about the need for amici's participation.

The Court should deny leave to participate in argument because the issues amici raise in their motion are not clearly presented in this case, which is about whether

the Double Jeopardy Clause bars a federal prosecution following a state prosecution. *See Abbate v. United States*, 359 U.S. 187 (1959). Amici are concerned with the opposite scenario: whether the Clause bars a state prosecution following a federal prosecution. *See Bartkus v. Illinois*, 359 U.S. 121 (1959). Amici contend that this case will resolve both the federal-first and the state-first questions. *See* Motion at 2. But the parties have neither raised nor briefed the question whether the Double Jeopardy Clause, as incorporated through the Fourteenth Amendment, would bar a state prosecution following a federal prosecution. That question presents a different set of issues than are at stake here. In fact, Petitioner's own amici disagree about whether the result in this case would extend to the federal-first question. *Compare* Brief of Amici Curiae Criminal Defense Experts In Support of Petitioner, at 16, *with* Brief of Amici Curiae Criminal Procedure Professors In support of Petitioner, at 31 n.8. Respondent's amici also recognize that federal-first prosecutions present a different set of issues. One brief makes a Tenth Amendment argument that is not implicated when an initial state prosecution bars a second federal prosecution. *See* Brief of Amici Curiae National Association of Counties et al., at 6–10. Another argues the issue is different for American Indian Tribes because Congress has plenary control over incorporation of the Bill of Rights against the tribes and because tribal prosecutions do not implicate federalism. *See* Brief of Amici Curiae National Indigenous Women's Resource Center and National Congress of American Indians, at 25–30.

In any event, amici's arguments are fully laid out in their brief. Argument time should be limited to amici whose interests and arguments are directly at issue and are not adequately presented in the briefs. And amici fit neither bill.

Even if amici were to participate, this Court should deny the request for expanded argument time. Granting the request would set a surprising precedent. This Court generally does not expand argument time for an amicus simply because a case presents an issue of federal criminal law that may affect state criminal law. Indeed, amici have cited not a single example of such a result. In nine of amici's ten cited cases, this Court granted a state *divided* argument time, not additional time. Motion at 3. The only cited case granting additional time to an amici state was decided nearly fifty years ago and involved a constitutional challenge to an ordinance passed by one of California's own municipalities. *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972). California's interest in its own municipality's ordinance was far more direct than amici's interest in the federal issue at stake here. The reason for this lack of precedent supporting amici is also readily apparent: If amici's interest in this case were truly substantial, Respondent would surely have offered to divide its argument time.

* * *

The Court should deny amici leave to participate in oral argument. If this Court were to permit amici to participate, amici's time should be divided with Respondent. However, if this Court were to grant amici additional time, Petitioner should be granted the same amount of additional time.

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No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

The Court should grant the motion for the amici States to participate in oral argument in this important case concerning whether nearly two centuries of precedent should be overturned. None of petitioner's contrary arguments counsels against the Court hearing from the broad and diverse group of 36 States whose sovereignty petitioner blithely attacks.

1. Petitioner first argues that, because this case involves a subsequent federal prosecution, the States' interests are not implicated. But petitioner's own merits briefing insists that the opposite is true. The question presented—as drafted by petitioner—asks "[w]hether the Court should overrule the 'separate sovereigns' exception to the Double Jeopardy Clause." Pet. Br. i; Pet. i. That formulation does not limit the Court's analysis to a subsequent federal prosecution. To the contrary, petitioner's brief repeatedly attacks "duplicative prosecutions." *See* Pet. Br. 3; *accord* Pet. Br. 6, 36, 43, 45. Petitioner's brief never

suggests that which sovereign goes first matters; under petitioner's view of the law, it does not.

Petitioner's request for certiorari also concerns the separate-sovereignty doctrine simpliciter, without regard to which sovereign prosecutes second. Petitioner argued that his case uniquely presented a clean vehicle for the Court to address that doctrine where previous efforts have faltered: "[A]s is often the case when binding precedent from this Court forecloses a line of argument, cases raising this issue have been few and far between. And those few to have raised it have been riddled with vehicle problems." Pet. 3 (citing *Walker v. Texas*, 137 S. Ct. 1813 (2017) (denying certiorari)). That single case cited by petitioner as having previously raised "this issue"—the issue presented by petitioner— concerned a subsequent prosecution by the State of Texas. *See* Pet. 3. That confirms that the issue presented concerns the separate-sovereignty doctrine as a whole, not just some application of it to successive federal prosecutions. Yet, having secured certiorari and presented argument on "this issue," petitioner now avoids its scope in an effort to shut the States out.

Petitioner's repeated attacks on *Bartkus v. Illinois*, 359 U.S. 121 (1959), confirm that this case implicates the sovereignty of the States. Petitioner's merits brief references *Bartkus* no fewer than 34 times. *Bartkus* involved exactly what petitioner now argues this case does not implicate: a subsequent state prosecution. *See Bartkus*, 359 U.S. at 121-24 (upholding, under the separate-sovereignty doctrine, Illinois's prosecution of Bartkus for robbery following acquittal on a robbery charge in federal court). Indeed, petitioner describes that subsequent state prosecution as "intolerable." Pet. Br. 29.

Moreover, petitioner's purported originalist understanding of the Double Jeopardy Clause relies significantly—indeed, almost entirely—on a series of decisions from state

high courts around the time of the founding and several decades thereafter. *See* Pet. Br. 5, 17-20 (discussing cases from Massachusetts, Michigan, Missouri, North Carolina, South Carolina, Vermont, and Virginia). Petitioner discusses those state cases at length to argue that the "overwhelming weight of state authority" allegedly favors his preferred reading of the Double Jeopardy Clause. Pet. Br. 19. Those state courts were not, of course, sitting in judgment of whether subsequent *federal* prosecutions were proper. Those state courts were considering subsequent *state* prosecutions.

Petitioner's claim that the States have no special interest in the outcome of this case thus contradicts his own briefing. If the Court is inclined to indulge petitioner's attack on the States' sovereignty, it should hear from them at oral argument.

2. Petitioner next argues that amici States do not merit oral argument because their "arguments are fully laid out in their brief." Resp. 3. Amici deserve argument, according to petitioner, only when their views "are not adequately presented in the briefs." Resp. 3. But it would be absurd to incentivize amici to draft incomplete briefs in order to have a chance to present their case orally and answer the Court's questions. Petitioner cites no authority for his counterintuitive proposition. The Court hears from amici routinely, including amici who draft thorough briefs.[1]

---

[1] *See, e.g.*, *Garza v. Idaho*, No. 17-1026 (S. Ct. 2018) (granting leave to the United States to participate in oral argument as amicus curiae); *Knick v. Township of Scott*, No. 17-647 (S. Ct. 2018) (same); *see also Sturgeon v. Frost*, No. 17-949 (S. Ct. 2018) (granting leave to Alaska); *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (Kansas); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Texas); *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (New York); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (New York); *Halbert v. Michigan*, 125 S. Ct. 1822 (2005) (Louisiana); *Clingman v. Beaver*, 125 S. Ct. 825 (2005) (South Dakota); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 457 (2004) (Alabama); *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972) (California).

3. Lastly, petitioner argues that, if the amici States had a "truly substantial" interest in this case, "Respondent would surely have offered to divide its argument time." Resp. 3. Again, petitioner cites no authority, perhaps because that argument makes no sense. As set out in the amici States' brief, the United States and the amici States have overlapping yet distinct interests. The fact that the United States wishes to use its full 30 minutes of argument time to defend its own interests against petitioner's arguments in no way undercuts the importance of this case to the amici States.

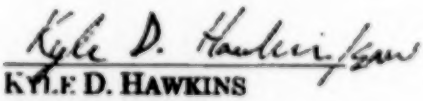
* * *

Petitioner does not deny that he will suffer no prejudice if the amici States' motion is granted. He explicitly requests that his own time be expanded by 10 minutes in the event that the Court grants the amici States' motion. Resp. 3. That is a sensible solution—one that all sides can accept. Petitioner further does not deny that the amici States' request is workable, as this is the only case scheduled for argument on December 5. When a case implicates state interests this important, there is every reason to permit the modest increase in argument time that the amici States seek so that they might have a full opportunity to defend the interests that petitioner attacks.

CONCLUSION

The amici States respectfully request that the Court grant the motion to participate in oral argument and for ten minutes of argument time.

Respectfully submitted.



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NOVEMBER 2018

No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER, CATO INSTITUTE, AMERICAN CIVIL LIBERITES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF ALABAMA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil-rights laws. The ACLU of Alabama is a statewide affiliate of the national ACLU, with thousands of members throughout the state. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

both as counsel representing parties and as *amicus curiae*.

Amici have a strong interest in ensuring that all constitutional provisions, including the Double Jeopardy Clause, are applied in a manner consistent with their text and history.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Terance Gamble was convicted in Alabama state court for being a felon in possession of a firearm and served a one-year sentence. The federal government, through the Alabama U.S. Attorney's Office, then charged Gamble with being a felon in possession of a firearm under federal law for the very same conduct giving rise to his state conviction. Pet. App. 6a.

If this successive prosecution had been carried out by one government, it plainly would have violated the Fifth Amendment's Double Jeopardy Clause, which prohibits any person from being "twice put in jeopardy of life or limb" for the "same offence." U.S. Const. amend. V. However, because the charges were filed by a State and the federal government respectively, the so-called dual-sovereignty exception to the Double Jeopardy Clause permitted Gamble to be prosecuted twice for the same offense. This result does not accord with the Double Jeopardy Clause's text or history and undermines our constitutional structure.

First, the exception is not supported by the text of the Clause, which focuses on the "person" being charged, and does not reference the sovereign(s) doing the charging. Being charged with a crime causes a person "embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and

insecurity, as well as enhanc[es] the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957). These consequences are the same no matter which sovereign charges him. Moreover, the term "same offence" is a capacious one that naturally includes charges for the same crime by two different sovereigns.

Second, the history of the Double Jeopardy Clause makes clear that it prohibits successive charges by two sovereigns. The Framers adopted the Fifth Amendment to enshrine in the Constitution the English common-law defense of *autrefois acquit*, or "formerly acquitted." *See, e.g., Grady v. Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting). That English common law, in turn, permitted defendants to introduce evidence of an acquittal by a foreign court as a defense to a charge in England. *See* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1, 8-9 (1956). For that reason, it is little surprise that numerous American sources in the decades following the Founding—including opinions from this Court, opinions from state supreme courts, and treatises—assumed that charges by separate sovereigns for the same offense would violate the Double Jeopardy Clause. *See, e.g., United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820); *State v. Antonio*, 5 S.C.L. 562, 2 Tread. 776, 781 (1816). It is only more recently that the dual-sovereignty exception has permitted such successive charges.

Finally, the dual-sovereignty exception is at odds with the purpose of the Double Jeopardy Clause and the constitutional structure more broadly. The Framers viewed the Double Jeopardy Clause as a fundamental protection of individual liberty and an important safeguard against government harassment

and overreach. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1774, at 653-54 (Boston, Hillard, Gray, and Co. 1833). The dual-sovereignty exception, by allowing two governments to do together what neither could do alone, undermines the fundamental protection of individual liberty that the Double Jeopardy Clause was adopted to achieve. When a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of who brings the successive prosecutions. Worse yet, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of who brings them.

Reconsideration of the dual-sovereignty exception is particularly appropriate today given two significant legal developments that have occurred since this Court last meaningfully considered the issue in 1959. *See generally United States v. Gaudin*, 515 U.S. 506, 521 (1995) (reasons for *stare decisis* undermined when the "underpinnings" of the "decision in question" have been "eroded[] by subsequent decisions of this Court").

First, when this Court adopted the dual-sovereignty exception, the Double Jeopardy Clause's prohibition on successive prosecutions did not apply to the States. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). Whatever validity the doctrine may have had in that context, it has been undermined by subsequent decisions by this Court recognizing that the Fourteenth Amendment protects against state infringement of the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784 (1969). Just as incorporation led to the demise of other "dual sovereign" doctrines, so should it here. Where both state and federal officials are barred from bringing successive prosecutions for the same

offense, it makes little sense to allow them to do together what neither could do on their own.

Second, concerns about government overreach and harassment are particularly acute today because the scope of federal criminal law is far more expansive than it was when the dual-sovereignty exception was last considered, *see, e.g.*, *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (noting that "the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws"), and federal law often overlaps with state law even as to localized conduct, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997). There is now also significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011); Meese, *supra*, at 3. These two factors, taken together, make it particularly easy for the federal and state governments to engage in the repeated harassment for a single offense that the Double Jeopardy Clause was adopted to prevent.

For all these reasons, this Court should overrule the dual-sovereignty exception to the Double Jeopardy Clause and restore the proper scope of this important protection of individual liberty.

ARGUMENT

I. THE DUAL-SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE IS AT ODDS WITH THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTION.

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall be . . . subject for

the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The text, history, and structure of the Constitution make clear that the Double Jeopardy Clause prohibits the federal and state governments from successively charging the same defendant for the same crime.

1. First, the text of the Double Jeopardy Clause, which provides that "[n]o *person* shall be . . . subject for the same offence to be twice put in jeopardy of life or limb," *id.* (emphasis added), is inconsistent with the idea that different sovereigns may charge an individual for the same crime. After all, the Clause's text focuses on the "person" being put in jeopardy, and does not even mention the sovereign or sovereigns putting the person in jeopardy. And that is for good reason: the Clause was adopted to prevent the "embarrassment, expense and ordeal" and the "continuing state of anxiety and insecurity" that would result if individuals could be charged with the same criminal offense more than once. *Green*, 355 U.S. at 187; *see Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct.").

From the perspective of the person charged, the jeopardy of life or limb that a criminal charge causes—and the concomitant "embarrassment," "anxiety," and "insecurity"—are the same no matter which sovereign causes it. As Justice Black reasoned, "[i]f danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, then when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Put differently, a defendant

"probably d[oes] not feel better off being doubly prosecuted by different governments rather than by the same one." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 Colum. L. Rev. 1, 9 (1995).

In the past, some have looked to the term "same offence" to justify the dual-sovereignty exception, suggesting that a violation of the laws of two different sovereigns can never be the same offense. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (if a person commits an act that violates the laws of two sovereigns, "he has committed two offences, for each of which he is justly punishable").

But the term "offence" at the time of the Founding was defined broadly as "[a]ny transgression of law, divine or human; a crime; sin; act of wickedness or omission of duty." 2 *Webster's Dictionary* 203 (1st ed. 1828). Thus, the term "same offence" can apply to the "law[s]" or "crime[s]" of two different sovereigns, just as it can apply to two different crimes of the same sovereign. *Cf. Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) (rejecting the idea that "two criminal provisions create 'distinct' offenses simply by appearing under separate statutory headings"). It is thus this Court's long-standing test from *Blockburger v. United States*, 284 U.S. 299 (1932), which looks to whether the elements of two laws each "require[] proof of a different element," *id.* at 304, that should determine whether laws constitute the same "offence," not whether the laws are enforced by different sovereigns. In short, the

text of the Double Jeopardy Clause provides no support for a dual-sovereignty exception to its protections.

2. In addition to the text, the history of the Double Jeopardy Clause makes clear that the Framers adopted the Clause to ensure that an acquittal or conviction in one jurisdiction could be pled as a defense in another jurisdiction.

At the time of the Founding, English common law allowed a defendant acquitted in a foreign court to raise the defense of *autrefois acquit*, or "formerly acquitted," and *autrefois convict*, or "formerly convicted," to subsequent criminal charges in another jurisdiction. *See* Grant, *supra*, at 8-9. For example, in the leading case of *Rex v. Hutchinson*, the judges apparently concluded that Hutchinson's acquittal of a murder charge in a Portuguese court served as a defense in England for the same crime. *Id.* at 9.[2] Similarly, in *The King v. Captain Roche*, Captain Roche pleaded *autrefois acquit* to a murder charge based on an acquittal before a Dutch court, and the court held that the acquittal barred the charge. As the judges noted: if the court held "for the prisoner" on the *autrefois acquit* issue, the jury "could not go to the [issue of guilt] because that finding [of *autrefois acquit*] would be a bar." *The King v. Captain Roche*, 1 Leach 134, 135, 168 Eng. Rep. 169 (1775).

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[2] This Court has previously questioned whether it is appropriate to rely on *Rex v. Hutchinson* given that the case was never reported itself, but instead only discussed in other cases. *See, e.g.*, *Bartkus*, 359 U.S. at 128 n.9 (questioning the "confused and inadequate reporting" of the case). But what is important is what the Framers of the Fifth Amendment would have understood it to mean, and at the time of the Founding numerous other courts and treatises treated *Hutchinson* as a case that stood for the proposition that an acquittal in one court served as a defense in another court.

Based on these precedents, Founding-era treatises made clear that an acquittal in any court could serve as a bar to further prosecution in any other court. For instance, Hawkins' 1762 *Pleas of the Crown* explained that "if a Man steal Goods in one county, and then carry them into another, in which case it is certain . . . that he may be indicted and found guilty in either, it seems very reasonable, that an acquittal in the one County for such stealing may . . . be pleaded in bar of a subsequent prosecution for the same stealing in another county" because otherwise "his life would be twice in danger from that which is in truth but one and the same offence." 2 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 35, § 4, at 526 (Thomas Leach ed., 6th ed. 1787). Hawkins later reiterated that "an acquittal of murder at a grand sessions in Wales, may be pleaded to an indictment for the same murder in England. [F]or the . . . rule is, [t]hat a man's life shall not be brought into danger for the same offence more than once." *Id.* § 10, at 529. At no point in his treatise did Hawkins attempt to determine whether two counties, or England and Wales, were separate sovereigns for purposes of the *autrefois acquit* or *autrefois convict* defenses, as modern dual-sovereignty doctrine requires.

Similarly, MacNally's *Rules of Evidence on Pleas of the Crown*, published in England and the United States just after the Founding, explained that "[the] final sentence, decree, or judgment of any foreign court which hath competent jurisdiction of the subject determined before them, is conclusive evidence *in any other court of concurrent jurisdiction*; and therefore an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." 2 Leonard MacNally, *Rules of Evidence on Pleas of the Crown* 427-28 (1802); *see Green*, 355

U.S. at 200 (Frankfurter, J., dissenting) (quoting Blackstone's Commentaries as stating that "when a man is once fairly found not guilty upon any indictment, or other prosecution, *before any court having competent jurisdiction of the offence*, he may plead such acquittal in bar of any subsequent accusation for the same crime" (emphasis added)); Grant, *supra*, at 10 n.36 (collecting other treatises).

Members of the First Congress suggested that the Double Jeopardy Clause was intended to mirror this common law rule. *See, e.g.*, 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Livermore) (noting that it "is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence" and that the Clause "was declaratory of the law as it now stood"). Moreover, American treatises confirmed that the Double Jeopardy Clause imported English common law principles. *See, e.g.*, 3 Story, *supra*, § 1781, at 659 (the Double Jeopardy Clause "is another great privilege secured by the common law"); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* 467 (7th rev. ed. 1874) (the Double Jeopardy Clause "is nothing more than a solemn asservation of the common law maxim"); *see also Grady*, 495 U.S. at 530 (Scalia, J., dissenting) ("The Clause was based on the English common-law pleas of *autrefoits acquit* and *autrefoits convict* . . . ."); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873) (The Clause "prevent[s] a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").[3]

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[3] Notably, although Madison's initial proposal provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence," 1

Because of this, it is little surprise that early American courts repeatedly referenced the rule that acquittals from out-of-jurisdiction courts could act as defenses against criminal charges. Indeed, in an early opinion, this Court explained that "[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations . . . and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Furlong*, 18 U.S. at 197. Similarly, a South Carolina court around the same time stated that "[i]f [double jeopardy protections] prevail[] among nations who are strangers to each other, could it fail to be exercised with us [states] who are so intimately bound by political ties?" *Antonio*, 2 Tread. at 781. The Michigan Supreme Court opined that if the state and federal criminal code had "concurrent jurisdiction" over certain acts, a state "conviction would be admitted in federal courts as a bar." *Harlan v. People*, 1 Doug. 207, 212 (Mich. 1843). And the Supreme Judicial Court of Massachusetts held that where a State and the federal government have concurrent jurisdiction over certain criminal acts, "the delinquent cannot be tried and punished twice for the same offence" and "the court which *first* exercises jurisdiction has the right to enforce it by trial and judgment." *Commonwealth v. Fuller*, 49 Mass. (8 Met.) 313, 317-18 (1844) (emphasis added).

Annals of Cong. 451-52 (1789) (Joseph Gales ed., 1834), this proposal was amended in the Senate, and in its final form, the Double Jeopardy Clause used "the more traditional language employing the familiar concept of 'jeopardy,'" "language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*," *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

In fact, as recently as 1909, this Court observed that "[w]here an act is . . . prohibited and punishable by the laws of [two] states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other." *Nielsen v. Oregon*, 212 U.S. 315, 320 (1909).[4] Indeed, before this Court's first decision approving of the dual-sovereignty exception in *United States v. Lanza*, 260 U.S. 377 (1922), "the cases of actual double punishment found [were] so few, in relation to the great mass of criminal cases decided, that one can readily discern an instinctive unwillingness to impose such hardships on defendants," *Bartkus*, 359 U.S. at 160 (Black, J., dissenting). It is only more recently that this Court has adopted a dual-sovereignty exception that deviates from the common-law doctrine that existed in England and America before and after the Founding. That doctrine clearly prohibited second prosecutions for the same offense no matter which sovereign charged a person.[5]

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[4] In *Heath v. Alabama*, this Court sought to "limit[]" *Nielsen* "to its unusual facts" of "questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority." 474 U.S. at 91. However, nothing in *Nielsen*'s language suggests any such limitation. It is difficult to understand why the principle of prohibiting two states from charging a person for the same offense should apply any more to a situation where two states have concurrent jurisdiction over conduct in the same river—as in *Nielsen*—than to a situation where two states have concurrent jurisdiction over a kidnapping and murder that took place across state lines—as in *Heath*.

[5] Although many of these early precedents from England and America concern foreign-nation double jeopardy protections, there is no reason to limit the doctrine to that type of dual sovereignty. Sources from the Framing do not explain the doctrine in

3. In addition to having no basis in the Constitution's text and history, the dual-sovereignty exception also undermines the Clause's purposes, and the constitutional structure more broadly.

First, the dual-sovereignty exception is inconsistent with the purpose of the Double Jeopardy Clause, which, as noted above, was to ensure that individuals were not tried twice for the same offense. As Representative Samuel Livermore noted, "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted," and "in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Livermore); *see id.* (remarks of Rep. Roger Sherman) (observing that "the courts of justice would never think of trying and punishing twice for the same offence").

To the Framers, this prohibition on double jeopardy was essential to protecting a person's liberty from government overreach. *See* 3 Story, *supra*, § 1774, at

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terms of international relations, but in terms of the individual right of *autrefois acquit*. Moreover, if the Founders believed domestic courts should respect the acquittals or convictions of foreign courts, there is little reason why they would have thought they should accord any less respect to the findings of other domestic courts.

If anything, the argument for extending double jeopardy principles to separate sovereigns is *stronger* in the federal-state context than in the foreign-domestic sovereign context. That is because, as noted below, once the Double Jeopardy Clause was incorporated via the Fourteenth Amendment and applied to the states, the same prohibition applied to both federal and state officials. Where the same constitutional principle prohibits state and federal officials from successive prosecutions when they act independently, those same officials should not be allowed to avoid that prohibition by acting together.

653 (the Clause provided "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy"); *Green*, 355 U.S. at 187-88; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96 (1998) (Double Jeopardy Clause "safeguard[s] . . . the individual defendant's interest in avoiding vexation," whether he was first acquitted or convicted).

When a defendant is subjected to multiple prosecutions for the same offense, however, the "embarrassment, expense and ordeal," *Green*, 355 U.S. at 187, are the same regardless of who brings the successive prosecutions. The prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of who brought them. The dual-sovereignty exception carves a hole in this fundamental protection of liberty, requiring defendants who have been convicted or acquitted to "'run the gauntlet' a second time," *Abney v. United States*, 431 U.S. 651, 662 (1977).

More broadly, the dual-sovereignty exception also undermines the right to a jury trial enshrined in the Sixth Amendment. The jury trial right and the prohibition against double jeopardy go hand in hand. "[T]he Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). The Clause therefore "safeguard[s] not simply the individual defendant's interest in avoiding vexation but also the

integrity of the initial petit jury's judgment." Amar, *supra*, at 96.[6]

The dual-sovereignty exception undermines the role of the jury. Under the dual-sovereignty exception, a defendant with both state and federal charges arising from the same conduct could be acquitted by a state jury, then subsequently convicted by a federal jury—or vice versa. This possibility erodes the historic respect accorded to a jury's verdict. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 130 (1978).

Finally, some have defended the dual-sovereignty exception on federalism grounds, arguing that state and federal governments should be permitted to carry out law enforcement independently. But this view turns federalism principles on their head. The division of powers between state and federal governments was premised on the notion "that 'freedom is *enhanced* by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)) (emphasis added). As Madison explained, federalism provides "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed., 1961). Instead of protecting liberty, however, the dual-sovereignty exception permits the two levels of government to do together what neither could

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[6] Indeed, the "protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict." *Smith v. Massachusetts*, 543 U.S. 462, 466 (2005). Thus, for example, in an early case, an English court banned trial judges from attempting to eliminate double jeopardy protections by discharging juries when they were poised to deliver an acquittal. *King v. Perkins*, Holt K.B. 403, 90 Eng. Rep. 1122 (1698).

do alone. *Cf.* Meese, *supra*, at 21 (the Founders viewed "our separate sovereign governments as rivals that would protect citizens from overzealous government, as opposed to cooperating prosecutors successively trying a defendant for the same offense"). Federalism principles thus can provide no justification for the dual-sovereignty exception to the Double Jeopardy Clause's protections.

II. CHANGES IN THE LEGAL BACKDROP SUPPORT ELIMINATION OF THE DUAL-SOVEREIGNTY EXCEPTION.

As noted above, this Court has applied a dual-sovereignty exception to the Double Jeopardy Clause over the last century, despite the lack of support for such an exception in the Constitution's text, history, or structure. Though prior precedent should be accorded strong weight, it must give way when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992). Two legal developments—the incorporation of the Double Jeopardy Clause against the States and the exponential increase in the size of the federal criminal code—have substantially undermined whatever foundations might have initially supported the dual-sovereignty exception.

1. First, the incorporation of the Double Jeopardy Clause against the States dramatically undermines the rationale for the dual-sovereignty exception in the federal-state context. Until 1969, the Clause's protections did not apply to the States. *See Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."). "[T]he logic of *Barron v. Baltimore* furnished an important justification for the early dual

sovereignty doctrine." Amar & Marcus, *supra*, at 11. If a State could prosecute an individual as many times as it wanted for the same offense, or could prosecute him after he had already been prosecuted by the federal government, it was not unreasonable to think that the federal government could prosecute him after he had been prosecuted by the State.

When this Court last meaningfully considered the dual-sovereignty doctrine, in *Bartkus* and *Abbate*, it "leaned heavily on the prevailing view that the Fourteenth Amendment did not incorporate the Double Jeopardy Clause or the rest of the Bill of Rights." *Id.* at 9; *see Bartkus*, 359 U.S. at 124 ("We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."); *Abbate*, 359 U.S. at 194 ("The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government . . . and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority." (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))).

Indeed, "[t]his logic radiated beyond double jeopardy." Amar & Marcus, *supra*, at 11. The dual-sovereignty doctrine was applied in other contexts, such as the use of immunized testimony across state and federal jurisdictions. *See Feldman v. United States*, 322 U.S. 487, 491-92 (1944) (immunized testimony compelled by federal officials could nonetheless be used in state prosecutions). Similarly, as long as the Fourth Amendment's exclusionary rule did not apply to the States, the Court adopted a "dual sovereign" approach to the exclusion of illegally obtained evidence depending on which sovereign seized it and which sovereign

was seeking to use it. *See Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence seized unlawfully by federal officials could be used in state criminal proceedings).

In the years following *Bartkus* and *Abbate*, however, the Court recognized that most of the protections in the Bill of Rights, including the Double Jeopardy Clause, apply to the States via the Fourteenth Amendment. *See Benton*, 395 U.S. at 795-96 (double jeopardy); *see also, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth and Fifth Amendments); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (self-incrimination); *cf.* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Senator Jacob Howard, in introducing the Fourteenth Amendment, explained that its broad text protected against state infringement all of the "personal rights guaranteed and secured by the first eight amendments").

This Court also recognized that incorporating the Bill of Rights' protections against the States had critical implications for the viability of the dual-sovereignty exception in other areas of criminal procedure. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, the Court reexamined the doctrine that permitted federal prosecutors to use evidence unlawfully seized by state officers. As the Court explained, the "foundation" of the doctrine—"that unreasonable state searches did not violate the Federal Constitution"—disappeared when the Court held in 1949 that the Fourth Amendment applied against the States. *Id.* at 213. Significantly, the Court underscored that the Fourteenth Amendment had recognized the Fourth Amendment's importance as an individual right that could be violated by either the federal government or state governments: "[t]o the victim it matters not

whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

Four years later, in *Murphy v. Waterfront Commission*, this Court again recognized that the dual-sovereignty exception was inconsistent with incorporation. The Court held that one jurisdiction could no longer compel a witness to give testimony that could be used to convict him of a crime in another jurisdiction. *Murphy*, 378 U.S. at 77. As the Court explained, the incorporation of the Incrimination Clause against the States "necessitate[d] reconsideration of [the dual-sovereignty] rule." *Id.* at 57.

Both *Elkins* and *Murphy* stand for the proposition that "the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and . . . the federal and state governments should not be allowed to do in tandem what neither could do alone." Amar & Marcus, *supra*, at 16. They also reflect the common-sense notion that if a constitutional prohibition applies equally to state and federal actors, those actors should not be permitted to coordinate their actions to avoid the prohibition. Those principles are no less applicable in the context of the Double Jeopardy Clause than they are in the context of other criminal procedure issues.[7]

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[7] In the past, this Court has suggested that "undesirable consequences would follow if [the dual-sovereignty exception] were overruled. . . . [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate*, 359 U.S. at 195. But the fact that the government may be hindered in its ability to prosecute a person is not reason enough to decline to enforce a constitutional protection the Framers chose to include in the Bill of Rights. That reasoning would invalidate countless legal protections—from the right to a jury to the prohibition on unreasonable

As discussed earlier, that Clause was adopted to prevent an individual from being "subject[ed] . . . to embarrassment, expense and ordeal and compell[ed] . . . to live in a continuing state of anxiety and insecurity," and to avoid "enhancing the [greater] possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-88. A person experiences those harms whenever he is "twice put in jeopardy of life or limb," regardless of whether the second prosecution is brought by a different sovereign.

The Fourteenth Amendment's incorporation of the Double Jeopardy Clause's protections against the States thus underscores what the Constitution's text, history, and structure all make clear: the double jeopardy principle protects against successive prosecutions, regardless of the sovereigns bringing those prosecutions.

2. The continued application of the dual-sovereignty doctrine is also particularly troubling in an age of expansive federal criminal law and significant federal-state cooperation in law enforcement.

At the time the dual-sovereignty exception developed, the federal criminal code was sparse. As late as 1964, Justice White noted that "the States still bear primary responsibility in this country for the

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searches—all of which necessarily limit the government's power in order to protect individual liberty. In any event, even if the dual-sovereignty exception were overruled, it would only prohibit successive prosecutions for the "same offence." So long as state and federal laws covering certain conduct each "require[] proof of a different element," the Double Jeopardy Clause would not preclude prosecution by both sovereigns. *Blockburger*, 284 U.S. at 304. Thus, it is only in the rare case—like Gamble's—in which all elements of the two laws are the same that overruling the doctrine would affect the federal or state government's ability to prosecute.

administration of the criminal law; most crimes . . . are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system." *Murphy*, 378 U.S. at 96 (White, J., concurring); *see The Federalist No. 45*, at 292 (James Madison) (Clinton Rossiter ed., 1961) (assuming that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined" while "[t]hose which are to remain in the State governments are numerous and indefinite").

Today, that assumption could not be further from the truth. The United States Code contains 27,000 pages of federal crimes. *See* Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 59 (2015). And as former Attorney General Meese has noted, "[f]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction." Meese, *supra*, at 3. Thus, federal law now includes the following seemingly local crimes: "virtually all drug crimes, carjacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from an insurance company, and murder of a state official assisting a federal law enforcement agent." *Id.* (citations omitted).

To be sure, most prosecutions continue to be done at the state level, but the significant expansion of federal criminal law makes it much more likely that state and federal governments will have concurrent jurisdiction over the same criminal activity. This increasing jurisdictional overlap, combined with the dual-sovereignty exception, allows state and federal governments to circumvent double jeopardy prohibitions that would otherwise prevent a person from being prosecuted a

second time for the same offense. *See id.* at 6-7; *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970) (noting "the extraordinary proliferation of overlapping and related statutory offenses" and the resultant greater "potential for unfair and abusive reprosecutions," and recognizing the "need to prevent such abuses through the doctrine of collateral estoppel").

The possibility of successive prosecutions is especially acute in light of the increased federal-state cooperation in fighting crime. *See* Ryan, *supra*, at 31 ("State and federal law enforcement agencies regularly negotiate responsibility for investigating and prosecuting criminal activity punishable under both state and federal law, often involving drug trafficking, alien smuggling, racketeering, or conspiracy cases."). The dual-sovereignty doctrine makes it easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense—exactly what the Double Jeopardy Clause was adopted to prevent. Allowing a State and the federal government to both prosecute an individual for the same offense would "give government an illegitimate dress rehearsal of its case and a cheat peek at the defense." Amar & Marcus, *supra*, at 10; *see Ashe*, 397 U.S. at 447 (the Double Jeopardy Clause prohibits the government from treating a "first trial as no more than a dry run for [a] second prosecution").[8]

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[8] The government argues that under the so-called *Petite* policy, the Department of Justice will "generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was 'demonstrably unvindicated' by the prior state prosecution." U.S. Resp. to Pet. 11 (quoting United States Attorneys' Manual § 9-2.031 (2009)). However, the public—and particularly a prospective criminal defendant—has virtually no guidance as to what that means. And a fundamental constitutional right like the prohibition on double jeopardy should

In short, the exponential increase in the size and scope of federal criminal law beyond anything the Court could have imagined the last time it seriously considered the dual-sovereignty doctrine make reconsideration of the doctrine even more necessary today. To prevent state and federal governments from cooperating to successively charge defendants for the same offense, this Court should overrule the dual-sovereignty exception.

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not "leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Moreover, even if the federal government follows this policy, it does nothing to prevent state governments from successively prosecuting individuals.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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No. 17-646

In the
Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* CRIMINAL DEFENSE EXPERTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici are criminal defense practitioners with years of experience defending individuals in federal and state criminal prosecutions, and criminal law professors with years of experience examining the criminal justice system. Given their frequent interactions with prosecutors and forums across multiple sovereigns and their study of criminal justice, *amici* are uniquely positioned to explain how discarding the so-called "separate-sovereigns" exception to the Double Jeopardy Clause will enhance the criminal justice system by providing appropriate incentives to both prosecutors and defendants, while encouraging Congress to identify unique federal elements that justify criminalizing conduct at the national level. The resulting improvements to the criminal justice system will inure to the benefit of all parties to that system—prosecutors, defendants, defense counsel, lawmakers, and courts alike—and, in turn, to the public at large.

A full list of *amici* is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Elimination of the judicially created "separate-sovereigns" exception to the Double Jeopardy Clause not only makes sense as a matter of doctrine but also

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

would properly align incentives for prosecutors, defendants, and lawmakers on the local, state, and federal levels. In fact, nearly half of the states already prohibit prosecutions based on conduct previously prosecuted in federal court. Those state-law prohibitions have not created any undue obstacles to efficient criminal law enforcement.

Even without the judge-made separate-sovereigns exception, prosecutors for the second-in-time sovereign—whether federal or state—would remain capable of bringing a second prosecution so long as the offenses were, in fact, different. Under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), and its progeny, two offenses are sufficiently different for purposes of the Double Jeopardy Clause provided each contains an element that the other does not. That inquiry allows successive prosecutions for different offenses and incentivizes sovereigns to focus their criminal prohibitions on conduct that implicates their distinct concerns in our federal system. In particular, employing *Blockburger* rather than the separate-sovereigns exception incentivizes Congress to consider whether there is truly a distinct federal interest that justifies enacting a separate federal criminal offense and thus deters the overfederalization of criminal law and avoids wasted resources in the re-prosecution of crimes already prosecuted at the state and local levels.

Eliminating the separate-sovereigns exception would also facilitate plea bargaining, a practice that this Court has recognized enhances the administration of criminal justice. At present, the separate-sovereigns exception deters plea bargaining

because a guilty plea in a first-in-time prosecution can be used as near-conclusive evidence of guilt in a second-in-time prosecution by another sovereign. As a result, cases that could be efficiently resolved by a guilty plea needlessly consume significant resources of prosecutors, defense counsel, and the courts. Eliminating the separate-sovereigns exception will remove that artificial impediment to plea bargaining.

Finally, eliminating the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government or a state government. In our federal system, there is no reason for individuals to be subject to double jeopardy based on the identity of the second-in-time sovereign. The evolution and application of this Court's incorporation doctrine is one of the intervening legal developments that justifies reconsideration of the separate-sovereigns exception. And that same incorporation doctrine requires that the Double Jeopardy Clause must apply equally to the federal government and state governments. That result only makes sense in our federal system. Indeed, ensuring that both the federal and state governments are bound by a liberty-preserving provision like the Double Jeopardy Clause is critical to ensuring that the promise of the Framers that being subjected to two sovereigns would enhance, not reduce, liberty is fully realized.

ARGUMENT

I. Eliminating The Separate-Sovereigns Exception Will Not Impede, But Will Enhance, The Orderly Administration Of Criminal Justice In Our Federal System.

The separate-sovereigns exception has been justified on the basis of the supposed "undesirable consequences" that would follow if prosecution by one sovereign barred prosecution of the same offense by another sovereign. *Abbate v. United States*, 359 U.S. 187, 195 (1959); *see* U.S. Br. in Opp. to Cert. 7. Specifically, the United States has argued here that, "if a federal prosecution could bar [subsequent] prosecution by a State, the result would be a significant interference with the States' historical police powers." U.S. Br. 7. And if a state undertook the first prosecution, the United States contends, "'federal law enforcement must necessarily be hindered.'" *Id.* (quoting *Abbate*, 359 U.S. at 195).

These concerns are vastly overstated. As an initial matter, almost half of the states *already* bar a state prosecution based on conduct that has previously been prosecuted in federal court. Frequently these prohibitions are a matter of state statutory law; for example, California law provides that "[w]hen an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state." Cal.

Penal Code §793.[2] In other states, comparable prohibitions are enshrined in the state constitution. *See, e.g.*, *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) (holding that subsequent state prosecution following federal-court acquittal for the same crime is unconstitutional under state Double Jeopardy Clause). But in either case, the profusion of these proscriptions dramatically undercuts the contention that eliminating the separate-sovereigns exception would result in "significant interference with the States' historical police powers," or that the exception is necessary to the orderly administration of criminal justice.

More fundamentally, the absence of the separate-sovereigns exception would not mean that the federal government or state governments will be left without means to vindicate their distinct sovereign interests when prosecuting crimes. Any concerns that overruling the separate-sovereigns exception would leave the criminal law of a second-in-time sovereign unvindicated are better addressed by this Court's longstanding *Blockburger* doctrine, articulated in

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[2] *Accord* Ark. Code Ann. §5-1-114; 11 Del. Code Ann. tit. 11, §209; Ga. Code Ann. §16-1-8; Haw. Rev. Stat. §701-112; Idaho Code Ann. §19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code Ann. §35-41-4-5; Ky. Rev. Stat. Ann. §505.050; Minn. Stat. Ann. §609.045; Miss. Code Ann. §99-11-27; Mont. Code Ann. §46-11-504; Nev. Rev. Stat. Ann. §171.070; N.J. Rev. Stat. §2C:1-11; N.Y. Crim. Proc. §40.20.2; N.D. Cent. Code Ann. §29-03-13; Okla. Stat. Ann. tit. 22, §§130-131; 18 Pa. Cons. Stat. and Cons. Stat. Ann. §111; Utah Code Ann. §76-1-404; Va. Code Ann. §19.2-294; Wash. Rev. Code Ann. §10.43.040; Wis. Stat. Ann. §939.71; *see also Commonwealth v. Cepulonis*, 373 N.E.2d 1136, 1141 (Mass. 1978) (generally adopting "same evidence" test to decide when a prior federal prosecution will bar a subsequent state prosecution).

Blockburger v. United States, 284 U.S. 299 (1932), and its progeny.

The *Blockburger* doctrine sets forth the "established test for determining whether two offenses" arising from the same act or transaction "are sufficiently distinguishable to permit" a prosecution for the second offense following a prosecution for the first offense notwithstanding the Double Jeopardy Clause. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Under *Blockburger*, two criminal offenses are not the "same offense" for double jeopardy purposes if each offense "requires proof of a fact which the other does not." 284 U.S. at 304. This test "emphasizes the elements of the two crimes," *Brown*, 432 U.S. at 166, and indeed has been described as the "same-elements test," *United States v. Dixon*, 509 U.S. 688, 696 (1993). In short, if "each offense contains an element not contained in the other," they are different offenses for purposes of the Double Jeopardy Clause. *Dixon*, 509 U.S. at 696.

Because of the separate-sovereigns exception, the *Blockburger* test has typically been applied only within a single sovereign—*i.e.*, to determine whether a single sovereign (a state or the federal government) may prosecute a second offense following its own prosecution of a first offense. At least in federal court,[3] there has yet been no occasion to apply the

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[3] A number of states that already prohibit subsequent prosecutions for the same offense across sovereigns have employed a *Blockburger*-like test to permit a subsequent state prosecution when the state and federal crimes are not the "same offense." *See, e.g.*, *People v. Dipre*, 70 N.Y.S.3d 823 (N.Y. Sup. Ct. 2018); *People v. Halim*, 223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017).

Blockburger test across two sovereigns—*i.e.*, to determine whether one sovereign may prosecute a second offense following a prosecution of a first offense by a different sovereign—because the separate-sovereigns exception has categorically removed that circumstance from the purview of the Double Jeopardy Clause. But there is no principled reason why, if the separate-sovereigns exception is eliminated, the *Blockburger* test would not apply across sovereigns in determining whether the offense a second sovereign seeks to prosecute is the "same offense" as the offense in the earlier prosecution.

As a result, abolishing the artificial separate-sovereigns exception—found nowhere in the plain text of the Fifth Amendment—will not categorically spell the end of a second-in-time sovereign's ability to vindicate its distinct sovereign interests. Rather, the second-in-time sovereign will be able to pursue its prosecution so long as it is not prosecuting the "same offense," *i.e.*, if the two offenses differ under *Blockburger*'s "same-elements" test. For example, if a human trafficker brings individuals into the country under false circumstances, *Blockburger* allows the federal government to prosecute visa fraud while state authorities prosecute sex trafficking offenses. *See, e.g.*, *Halim*, 223 Cal. Rptr. 3d at 499-501 (holding that federal visa fraud and state sex trafficking are different offenses under *Blockburger*). Similarly, in the case of health care fraud, a state may be able to prosecute state criminal health care fraud charges while federal prosecutors pursue charges of making a false statement to the United States. *Cf., e.g.*, *United States v. Gonzales*, 834 F.3d 1206, 1219-20 (11th Cir. 2016) (holding that federal conspiracy to commit

health care fraud, 18 U.S.C. §§1347, 1349, and conspiracy to defraud the United States, 18 U.S.C. §371, are different offenses under *Blockburger*). And someone transferring obscene materials to a minor to induce them into a sexual act could face federal charges for the transfer of materials and state charges for the enticement. *Cf., e.g., United States v. Taylor*, 777 F.3d 434, 438-40 (7th Cir. 2015) (holding that federal prohibition on transfer of obscene materials to a minor, 18 U.S.C. §1470, and federal prohibition on enticement, 18 U.S.C. §2422(b), are different offenses under *Blockburger*). In short, each sovereign will continue to be able to prosecute different crimes in a manner that protects its respective sovereign interests.

Although applying *Blockburger* across sovereigns will still allow subsequent prosecutions when the sovereigns pursue distinct crimes, *Blockburger* and the separate-sovereigns doctrine are not co-extensive. When the federal government criminalizes conduct not to address some distinct federal interest but to be seen as "doing something" to address a perceived problem that has long been the province of state law enforcement, *Blockburger* will not save a subsequent duplicative prosecution that merely rehashes what a prior prosecution has already litigated. But that is a feature, not a bug. Eliminating the separate-sovereigns doctrine and refocusing attention on *Blockburger* will have the salutary benefit of incentivizing sovereigns to avoid duplicative criminal prosecutions and to draft criminal laws that faithfully reflect their distinct sovereign interests, if any. Because the *Blockburger* inquiry looks to the statutory elements of each offense, reliance on *Blockburger* will

require a second-in-time prosecutor to find a criminal offense that criminalizes conduct unique to that sovereign. A sovereign's legislature will know that if it simply rehashes the same elements of another sovereign's criminal offense, or merely repeats those elements while adding a single new element, the Double Jeopardy Clause will appropriately prohibit successive prosecutions. *Cf. Brown*, 432 U.S. at 167 (greater-included offense is "the 'same' for purposes of double jeopardy" as lesser-included offense). That, in turn, will incentivize the legislature to refocus on whether there is really a need for criminalization at that level of government.

Accordingly, eliminating the separate-sovereigns exception and permitting *Blockburger* to apply across sovereigns will likely result in fewer, but clearer, more finely tuned criminal laws, benefiting all parties to the criminal justice system—prosecutors, defendants, defense counsel, and courts. It will have an especially constructive impact at the federal level, in light of the almost universally recognized trend toward "overcriminalization" in federal law. *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting); *see also, e.g.*, Julie Rose O'Sullivan, *The Federal Criminal Leviathan*, 37 Harv. J.L. & Pub. Pol'y 57, 57 (2014) (noting that there are at least "4,000 criminal statutes, but no one actually knows how many criminal prohibitions exist, in part because Congress regularly delegates to federal agencies the authority to promulgate regulations implementing legislation"); Hon. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 Am. J. Trial Advoc. 571, 575 (1994) (urging Congress to reconsider continuing to "sweep[] many newly created crimes,

such as those involving juveniles and handgun murders, into a federal court system which is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity"); Pet'r Br. 42-46. Applying the more focused *Blockburger* inquiry, rather than the free pass of the separate-sovereigns exception, would give Congress an incentive to refocus on whether there is a distinctly federal interest justifying proposed criminal laws, and to avoid scoring political points by simply enacting federal laws that rehash state-level offenses, lard up the U.S. Code, and needlessly divert the resources of the federal criminal justice system.

Finally, eliminating the separate-sovereigns exception makes practical sense given the healthy cooperation between state and federal law enforcement. The federal and state governments have long worked "in cooperation" with each other to address and prosecute crimes in a single jurisdiction. *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959). For example, "[t]o promote cooperation and information-sharing," state and federal officials frequently established task forces whose participants include assistant U.S. Attorneys, state deputy district attorneys, federal agents, and local police department investigators. *United States v. Zone*, 403 F.3d 1101, 1103 (9th Cir. 2005) (per curiam). In cases where federal and state sovereigns both claim jurisdiction, that task force may help "make a strategic decision where to prosecute it." *See id.* Federal and state authorities may also practice "cross-designation," which is "the practice of swearing in a state law enforcement officer as a special deputy United States marshal to assist in joint state/federal task forces," or

"administering a similar oath to federal officers assisting in state prosecutions." *United States v. Lucas*, 841 F.3d 796, 801 n.4 (9th Cir. 2016); *see also, e.g.*, *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (discussing "the cross-designation of a state district attorney as a federal official to assist or even to conduct a federal prosecution"). In still other cases, authorities from one sovereign may share entire files with authorities from another sovereign, and they may even sit alongside each other "at the prosecution table" during trial in a single jurisdiction. *United States v. Figueroa-Soto*, 938 F.2d 1015, 1017 (9th Cir. 1991).

This federal-state cooperation demonstrates that when the "same offense" is prohibited by both state and federal law, coordination between jurisdictions can ensure that the offense is prosecuted once and for all in the proper jurisdiction. Similarly, when one or the other jurisdiction prohibits a different offense under *Blockburger*, state and federal prosecutors will have strong incentives to cooperate and coordinate in ways that reflect the distinct sovereign interests of our national and state governments. Accordingly, the separate-sovereigns exception is largely unnecessary—separate sovereigns can and do cooperate to prosecute a single sovereign's crime—and its elimination will hardly upend the administration of criminal justice. Rather, eliminating the exception will force lawmakers to refocus on each sovereign's distinct interests and promote further federal-state cooperation, which "undoubtedly fosters effective enforcement of the criminal law" and "is surely to be encouraged." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

II. Eliminating The Separate-Sovereigns Exception Will Facilitate Plea Bargaining.

Abrogating the separate-sovereigns exception will facilitate the resolution of cases through guilty pleas, rather than full-blown and resource-intensive trials. This Court has recognized that plea bargaining "is an essential component of the administration of justice" that "is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The potential benefits from efficient plea bargaining are legion: It "leads to prompt and largely final disposition of most criminal cases," "avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial," "protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release," and, "by shortening the time between charge and disposition, ... enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Id.* at 261 (citing *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). And from a practical perspective, efficient plea bargaining is not only desirable but necessary: "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* at 260. Yet the separate-sovereigns exception currently disincentivizes guilty pleas.[4]

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[4] None of this is to suggest that excessive reliance on plea bargaining does not have its costs. There are many situations in which the plea bargaining dynamic gives prosecutors undue leverage and even the innocent have little practical alternative but to accept a plea. *See generally* Oren Bar-Gill & Omri Ben-

For criminal offenses that could give rise to culpability under both federal and state law, the current separate-sovereigns exception places defense counsel in an untenable position during plea bargaining. If a defendant pleads guilty in one proceeding, that defendant's admission of guilt may later be used against him in a second-in-time proceeding by a different sovereign for the same offense. Courts have "uniformly found that evidence of a defendant's valid prior state-court guilty plea for similar or lesser included conduct is properly admissible in a subsequent federal prosecution, even where admission of the plea could be considered virtually 'tantamount to directing a verdict.'" *United States v. Frederick*, 702 F. Supp. 2d 32, 37 (E.D.N.Y. 2009); *see also id.* (collecting cases and holding that where "there is no allegation of any constitutional defect with the state court plea, there are no grounds for excluding a prior state court plea" in a subsequent federal court prosecution); *see also* Fed. R. Evid. 801(d)(2) (providing that opposing party's statement is not hearsay).

Defense counsel thus may be understandably reluctant to recommend that their clients plead guilty to an offense in one proceeding if that guilty plea may then be used against a client in a subsequent prosecution. For obvious reasons, defense counsel will

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Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. Legal Analysis 737 (2009). But whatever other measures are appropriate to make plea bargaining fairer and more efficient, it makes little sense to have a judge-made doctrine like the separate-sovereigns doctrine serve as an impediment to efficient plea bargaining in a whole class of cases.

not want to encourage their clients to plead guilty if doing so will hand a second-in-time prosecutor near-conclusive evidence (*i.e.*, a virtually insurmountable admission of guilt for the same offense in open court) for use in a subsequent prosecution.[5]

To be sure, first-in-time defense counsel can try to negotiate an agreement with a potential second-in-time prosecutor precluding the prosecutor from using the defendant's guilty plea or accompanying allocution in any subsequent trial. But that is not always—or even frequently—possible. If no charges have yet been filed in the potential second jurisdiction, there may be no prosecutor with whom defense counsel can negotiate. This problem is particularly pervasive in cases where there are multiple potential venues for a subsequent prosecution. Furthermore, even if first-in-time defense counsel is able to identify and contact the potential second-in-time prosecutor, defense counsel may not be licensed to practice in that second jurisdiction, and may thus be unable to negotiate or enter into a binding agreement with the prosecutor. And, of course, the second-in-time prosecutor may simply not agree to foreclose introduction of a prior guilty plea at a subsequent trial, especially when the subsequent investigation is in its nascent stages. *See*

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[5] The plea bargaining dynamic underscores the superiority of the *Blockburger* framework over the separate-sovereigns exception. When the elements of the federal and state offenses are materially different, the plea to the first offense still leaves prosecutors in the second jurisdiction with distinct elements to prove. But since the separate-sovereigns exception allows a second prosecution even when the elements are identical, it creates a dynamic where the plea to the first offense leaves the defendant with no defense to the follow-on prosecution.

United States v. Long, 852 F.2d 975, 979 (7th Cir. 1988).

Pleas of *nolo contendere* (or "no contest"), rather than guilty pleas, may provide some protection in second-in-time proceedings. *See* Fed. R. Evid. 803(22). But some states do not authorize such pleas,[6] and they may be strongly disfavored in practice even when technically permitted. *See, e.g., United States v. Dorman*, 496 F.2d 438 (4th Cir. 1974) (upholding district court's refusal to accept defendant's *nolo contendere* plea based on judge's "general rule" not to consent to such pleas). In all events, while in a subset of cases there may be creative ways of surmounting the difficulties that the separate-sovereigns exception presents for defense counsel advising a client on a guilty plea, there are other cases where the obstacles are insurmountable, and there is no valid reason for inflicting the costs of creative workarounds in the others. Eliminating the separate-sovereigns exception would remove all these obstacles and facilitate efficient plea bargaining in the many cases where the criminal offenses of multiple jurisdictions are potentially applicable.

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[6] *See, e.g., State v. Salisbury*, 147 P.3d 108, 112 (Idaho Ct. App. 2006) ("[T]here is no ... Idaho statute or rule that provides for *nolo contendere* pleas."); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 291 (Iowa 1982) (noting that "we do not have the plea of *nolo contendere*"); *People v. Daiboch*, 191 N.E. 859, 860 (N.Y. 1934) ("The plea of 'non vult' or 'nolo contendere' is an ancient plea in criminal cases still in use in some of the states but abolished here."); *Kibler v. State*, 227 S.E.2d 199, 201 (S.C. 1976) ("[T]he proper procedure for our lower courts to follow is to refrain from accepting pleas of Nolo contendere in felony cases until such are authorized by our legislature.").

III. Upon Elimination Of The Separate-Sovereigns Exception, The Double Jeopardy Clause Should Apply To Both The Federal Government And The States.

As reflected in the arguments set forth above, the elimination of the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government (as in this case) or a state government. No matter which sovereign comes second, the Double Jeopardy Clause bars prosecution of the "same offence" prosecuted in the first proceeding.[7] That much plainly follows from incorporation doctrine. Insofar as the evolution of incorporation doctrine is one of the reasons for reconsideration of the separate-sovereigns exception in the first place, *see* Pet'r Br. 35-42, it would be particularly bizarre not to apply the Double Jeopardy Clause (stripped of the judicially created separate-sovereigns exception) only in federal court. Thus, whether the first prosecution was state or federal and whether the follow-on prosecution is state or federal, the second-in-time prosecutors should not be able to pursue charges for the "same offence."

The underlying purpose of the Double Jeopardy Clause reinforces this conclusion. Just as "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown*, 432 U.S.

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[7] As this Court has made clear, moreover, the Clause bars a second prosecution for the same offense whether the first prosecution resulted in an acquittal or a conviction. *Brown*, 432 U.S. at 165.

at 169, the Clause cannot be evaded by mere strategic timing and location of first-in-time prosecutions. Irrespective of the initial forum, the Double Jeopardy Clause is intended to "shield individuals from the harassment of multiple prosecutions for the same misconduct." *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Unless the Double Jeopardy Clause is to be treated as a pleading obstacle, rather than a fundamental guarantee of liberty, the protections afforded by the Clause must apply whether the second-in-time prosecution is brought by the federal government or by a state.

The fundamental unfairness of duplicative prosecutions prohibited by the Double Jeopardy Clause does not depend on the order of the prosecutions. At bottom, the Double Jeopardy Clause is motivated by a concern for the *individual*. The individual's interest in securing finality as to an accusation of criminal conduct is plainly just as apparent in state-first and federal-first prosecutions:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). It is an equal "affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).[8]

To provide that much-needed finality, irrespective of whether the federal or state prosecution proceeds first, "a final judgment in a criminal case, just as a final judgment in a civil case, should preclude renewal of the fray anyplace in the Nation." *Sánchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (citations omitted). Finality in the criminal context is, after all, even more important than finality in the civil realm. *See United States v. Oppenheimer*, 242 U.S. 85, 87-88

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[8] *Accord, e.g.*, *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852) (McClean, J., dissenting) ("[T]he criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view ... no government, regulated by laws, punishes twice criminally the same act."); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 9 (1992) ("The cases that articulate and apply the dual sovereignty doctrine misrepresent a basic, structural features of American government. Their [erroneous] lesson, put simply, is that politics, not people, possess sovereign power in this country."); *id.* at 26 ("The people of the United States constitute the only sovereign power recognized under the nation's law."); see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 347 (1821) ("The people of the United States are the sole sovereign authority of this country."). *See also, e.g.*, J.L. Brierly, The Law of Nations 150 (5th ed. 1955) ("sovereignty" is a "much-abused word").

(1916) (noting that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt"). And conditioning finality on a prior state-court prosecution has serious implications for criminal practice—for example, it frustrates state courts' abilities require the defense to opt into reciprocal discovery. *See* Fed. R. Crim. P. 16(b) (imposing parallel discovery on the defense when the defense requests discovery from the prosecution). Given the large-scale information sharing between authorities, a defendant might be deprived of the ability to forgo revealing a defense before a potential trial in the second-in-time forum.

There is no practical need to make the Double Jeopardy Clause a one-way ratchet, since all of the benefits of federal and state cooperation run both ways. As Judge Calabresi has explained, the considerable frequency of federal-state prosecutorial cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

This Court has embraced Justice Kennedy's observation that the "genius" of the Framers was to recognize that subjecting the People to two sovereigns, rather than one, would enhance liberty. *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). The Framers' insight was genius precisely because it runs counter to the

intuition that doubling the number of sovereigns would double the sources of tyranny. The vast bulk of this Court's jurisprudence is faithful to and indeed facilitates the Framers' vision. But the judge-made separate-sovereigns doctrine stands out like the proverbial sore thumb. Allowing a second sovereign to pursue separate criminal charges out of a single incident without any regard to whether the two prosecutions involve the "same offence" is the very embodiment of the intuition that two sovereigns pose a greater threat to liberty than just one. The Court should take this opportunity to vindicate the Framers' liberty-enhancing vision and discard a doctrine that licenses two sovereigns to put an individual's liberty in jeopardy twice for the same offense.

CONCLUSION

For the foregoing reasons, this Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause and reverse the judgment of the Eleventh Circuit.

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No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATOR ORRIN HATCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the senior United States Senator from Utah and the former chairman of the United States Senate Committee on the Judiciary. *Amicus*'s duties require a keen interest in issues of both federal criminal law and federalism, including the impact of the federalization of criminal law on both law enforcement and our constitutional structure. *Amicus* submits this brief in order to provide this Court with an experienced legislator's perspective on the constitutional and practical issues at play as the Court considers whether to overrule the dual sovereignty doctrine in the double-jeopardy context.

SUMMARY OF ARGUMENT

1. This Court has previously upheld the dual sovereignty doctrine, which allows consecutive prosecutions for the same crime by a state and the federal government without violating the Fifth Amendment's Double Jeopardy Clause or the Fourteenth Amendment's Due Process Clause, as an incident of our federalist system. Historically, this accurately reflected the separate spheres of interest protected by each sovereign's body of criminal law, ensuring that the prerogatives of each sovereign were protected from undue or unintentional interference by

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amicus* signing this brief or his counsel made a monetary contribution to the preparation or submission of this brief.

the other. In the decades since this Court last considered the dual sovereignty doctrine, however, the federalist balance of interests in criminal law enforcement has been upset by the federalization of a wide swath of crime previously dedicated to state enforcement. In the process, the practical protection against double prosecution embedded in our federalist system – that the states and federal government generally regulated separate spheres of criminal conduct, with relatively minor overlap – has fallen away along with the federalist balance of responsibilities that this Court previously described.

The rapid federalization of traditionally state-created and state-enforced areas of criminal law is reflected in both the scope and substance of the modern federal criminal code. There is now the potential for the exact harms the Double Jeopardy Clause was designed to prevent – retrial after acquittal and double punishment after conviction – for countless crimes that were traditionally the states' responsibility to define and punish. And neither sovereign's interests nor the federalist system is well-served as a result. This Court should overrule its prior decisions upholding the due sovereignty doctrine as no longer consistent with the interests of federalism nor the liberty protections of the Double Jeopardy Clause.

2. The dual sovereignty doctrine poses a particular hardship to lawmakers in their efforts to craft criminal punishments that reflect the interests they are attempting to protect. Punishing crime requires a balance of multiple factors, including deterrence, the need for incapacitation, the relative

seriousness of an offense, and governmental resources. However, if another sovereign can enforce cumulative punishments on any crime that a lawmaker defines, the interests of neither sovereign will be reflected in the ultimate criminal punishment. In other words, because of the broad federalization of criminal law, the dual sovereignty doctrine no longer protects separate sovereigns' interests as clearly as when this Court last considered the doctrine, and is far more likely than it previously was to undermine both sovereigns' interests.

ARGUMENT

When this Court last reaffirmed the "dual sovereignty" exception to the Fifth Amendment's guarantee against successive prosecutions for the same crime, it did so to preserve the balance of power in our federalist system. As a matter of both constitutional theory[2] and historical practice,[3] the states bore primary

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[2] *See, e.g.*, The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 96 (1964) (White, J. concurring), *overruled in part on other grounds by United States v. Balsys*, 524 U.S. 666 (1998) ("[T]he States still bear primary responsibility in this country for the administration of the criminal law.").

[3] *See, e.g.*, Daniel J. Freed & Marc Miller, *Sentencing in the States*, 6 Fed. Sent. R. 122, 122, 1993 WL 613745 (Vera Inst.

responsibility for defining and prosecuting general crime, with federal criminal law focused on relatively narrow and specific areas of federal interest.

But the balance between state and federal power to define and punish crime has shifted massively since the vitality of the dual sovereignty doctrine was last before this Court. The federalization of criminal law over the intervening decades has given federal prosecutors the ability to bring coordinate federal charges for a wide array of conduct – in many contexts vitiating the distinction between federal and state interests in criminal punishment. In this hyperfederalized context, the federalist underpinnings of this Court's prior dual-sovereignty decisions no longer reflect the reality of federal-state relations, and may well undermine, rather than support, an appropriate division of power. In any event, those federalist interests are no longer sufficiently served by the doctrine to warrant the harm to individual liberty suffered by criminal defendants charged with federal crimes for conduct that traditionally fell under the states' power to criminalize and prosecute. Instead, the dual sovereignty doctrine leaves neither the federal government nor the states certain of whether the criminal justice system is appropriately validating their particular interests.

This Court should reconsider the dual sovereignty doctrine in cases of successive prosecutions for the same crime by the federal government and a state, in

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Just.) (Nov. 1, 1993) ("[M]ost criminal prosecutions are handled by the states.").

light of the extensive federalization of the traditional criminal-law prerogatives of the states.[4] The pervasive federalization of criminal law to cover conduct that traditionally was prosecuted and punished by the states, and that falls within the states' core legislative interests, threatens to undermine the protections of the Double Jeopardy Clause unless the dual sovereignty doctrine is overruled in this context.

I. The Extensive Federalization of Criminal Law Has Undermined the Rationale for the Dual Sovereignty Doctrine.

When this Court last directly considered the dual sovereignty doctrine in 1959, it upheld the doctrine as a boon to "our federal system." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). Specifically, allowing the federal government and the states to initiate dual prosecutions for the same offense was understood as a check on "displace[ment] of the reserved power of the States over state offenses." *Id.*; *see also id.* at 155 (Black, J., dissenting). The Double Jeopardy Clause was not yet incorporated under the Fourteenth Amendment, and *Bartkus* was concerned primarily with the possibility that federal prosecution of a narrow federal interest might preclude state prosecution of a serious crime. This Court sought to avoid the "shocking and untoward deprivation of the historic right and obligation of the

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[4] *Amicus* takes no position on the appropriate test to determine whether a federal and state charge constitute the "same offence" under the Fifth Amendment. *See* U.S. Const. amend. V.

States to maintain peace and order within their confines" that might result if "federal prosecution of a comparatively minor offense" preceded and foreclosed "state prosecution of [a] grave . . . infraction of state law." *Id.* at 137.

Bartkus and its companion case, *Abbate v. United States*, were accordingly built on the assumption that criminal law would be defined and enforced primarily by the states, with the federal government playing a only a smaller role in legislating and prosecuting crimes touching on particular federal interests. *See Abbate v. United States*, 359 U.S. 187, 195 (1959) ("[T]he States under our federal system have the principal responsibility for defining and prosecuting crimes."). This assumption was reasonable at the time, when federal criminal law was largely circumscribed to areas of particular federal interest, and the states were left to regulate and prosecute general crimes.

But what was true about the federalist nature of our criminal system in 1959 is no longer true today. In the decades since *Bartkus* and *Abbate*, Congress has federalized[5] criminal law at a staggering rate, and a substantial swath of substantive "state" crime is "federal" crime as well. Indeed, "[w]ith legislation

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[5] As used in this brief, "federalization" refers specifically to enactment of federal legislation defining and punishing crimes that were already regulated by the states without preempting states' ability to prosecute the same conduct. Federalization thereby alters the allocation of responsibilities between the federal and state governments.

covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas." John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1125 (1995).

This sweeping federalization of criminal law has undermined the federalism benefits of the dual sovereignty doctrine as described in *Bartkus* and *Abbate*. Unrestrained by the need to balance its own interests against the states', Congress has felt free to expand federal criminal law well beyond the scope envisioned at the founding and even through the mid-twentieth century, and the states have been powerless to resist. The diminished federalism interests served by the dual sovereignty doctrine in the era of federalization no longer justify the substantial threat to individual liberty posed by the potential for routine dual prosecutions for historically state-regulated crimes.

To restore the individual liberty protections of the Double Jeopardy Clause and ensure proper allocation of responsibilities in the federalist system, this Court should overrule *Bartkus* and *Abbate* insofar as they permit separate prosecutions for the same offense by a state and the federal government.

A. The Historical Division Between State and Federal Crime Has Almost Entirely Eroded Over the Past Sixty Years.

This Court first enunciated the dual sovereignty doctrine in *Fox v. Ohio*, 46 U.S. 410 (1847). In *Fox*, this Court held that the states had concurrent jurisdiction over areas of criminal enforcement explicitly within federal jurisdiction, such as offenses against "the current coin of the United States," and are not preempted from prosecuting such crimes. *Id.* at 434-35. This Court also discussed the potential double jeopardy implications of such a rule, and concluded that the possibility of double punishment by dual sovereigns did not require preemption. *Id.* Reflecting the balance between the federal and state roles in criminal law enforcement of the era, this Court believed that dual prosecutions for the same conduct, if constitutionally permissible, would be exceedingly rare. *See id.* at 435 ("It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."). Such a belief was well-founded in an era when the enactment and enforcement of general criminal laws was the province of the states – an arrangement that, though somewhat weakened, persisted and prevailed up to and through this Court's last consideration of the dual sovereignty doctrine in 1959.

The Constitution granted Congress specific power to regulate only four categories of crime: counterfeiting of federal money and securities, U.S. Const. art. I, § 8, cl. 6; "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id.* cl. 10; crimes committed in the District of Columbia and on other federal land, *id.* cl. 17; and treason, *id.* art. III, § 3, cl. 2; *see also* Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 456 n.10 (1994). Before the Civil War, "the federal government's role in defining and enforcing criminal law was limited to the areas of unique national concern listed among its constitutionally enumerated powers." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 4 (1992). *Fox* was thus decided against a backdrop of highly limited federal role in criminal law enforcement, and one that was largely limited to subject matter of specific interest to the federal government.

Even where the federal government regulated and punished general crimes around the time *Fox* was decided, the scope of such enforcement was limited to areas of particular federal concern, either geographically or by virtue of the subject protected. For instance, "[i]n 1790, Congress made it a crime to commit murder, manslaughter, mayhem, or larceny 'within any fort, arsenal, dock-yard, magazine, or in any other place . . . under the sole and exclusive jurisdiction of the United States,'" and in 1792 "Congress made it a crime to rob a carrier of, or to steal, the mail of the United States." George C. Thomas III, *Islands in the*

Stream of History: An Institutional Archeology of Dual Sovereignty, 1 Ohio St. J. Crim. L. 345, 348 (2003). While state law surely would have covered crimes such as murder and robbery, "as long as those acts took place on federal bases or were directed at mail carriers, the states might very well have been indifferent" to the federal government's enforcement of these laws. *Id.*

It was not until 1872 that Congress first enacted criminal legislation covering a general crime already regulated by the states, when it passed the original mail fraud statute, the predecessor to the current 18 U.S.C. § 1341. *See* Braun, *Praying to False Sovereigns* at 4 & n.14. That statute "was the first significant instance of federal legislation in an area traditionally within the states' jurisdiction." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1165 n.18 (1995).

It was not until Prohibition and the Great Depression, however, that federalization of criminal law would start to encompass a substantial amount of conduct already within the states' sphere of regulation. New federal laws "includ[ed], for the first time, crimes of violence against private individuals and businesses, as well as the first federal firearms legislation." Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825, 833 (2000). The Eighteenth Amendment granted Congress and the states concurrent power to enforce Prohibition, *see* U.S. Const. amend. XVIII, an invitation that Congress took up with passage of the National Prohibition Act (popularly known as the Volstead Act), Pub. L. No. 66-66, 41 Stat. 305 (1919). Enforcement of the Volstead

Act was at issue when this Court reaffirmed the dual sovereignty doctrine in *United States v. Lanza*, 260 U.S. 377 (1922). There, this Court held that the states and the federal government "[e]ach may, without interference by the other, enact laws to secure prohibition," and that prosecution under state prohibition provisions did not bar subsequent prosecution under the Volstead Act. *Lanza*, 260 U.S. at 382.

Despite the ratification of the Twenty-First Amendment in 1933, the repeal of Prohibition did not provide impetus to reverse the trend in the federalization of criminal laws designed to protect general welfare. Prohibition had given rise to "a thriving organized crime underworld and a massive federal law enforcement apparatus, [and] the federal government continued the federalization of criminal law directed at combatting organized crime even after the repeal of the Eighteenth Amendment." Michael A. Simons, *Prosecutorial Discretion & Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 904-05 (2000). Even so, the federal government's role in general criminal enforcement was limited compared to the states, even in this initial period of expansion. Federalization remained "modest[] ... through the middle part of the twentieth century." *Id.* at 905.

During the second half of the twentieth century,[6] however, the scope of federal criminal law exploded. *See* 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(d), at 75 n.297 (4th ed. 2015). In contrast to the narrow and explicit grants of authority to define and punish crime that underlay the antebellum federal criminal code, this rapid federalization of criminal law was accomplished largely through the use of Congress's power to regulate commerce, *see* U.S. Const. art. I, § 8, cl. 3, and used the approach that an "entire class of a given activity, be it manufacturing goods, loan sharking or drug dealing, by definition 'affects commerce'" and could therefore be the subject of federal criminal law. Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 Syracuse L. Rev. 1317, 1326 (2000). The rise of omnibus crime bills, which "can be hundreds of pages long and contain an infinite number of provisions defining new crimes," pushed federalization of the criminal law even further. *Id.* at 1327. Examples include "the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and

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[6] Exactly when the rapid expansion of federal criminal law began is somewhat contested. *See* 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(d), at 75 n.297 (4th ed. 2015). Regardless of whether the most explosive growth began in the 1960s, the 1980s, or somewhere in between, the massive federalization of criminal law could only be recognized as such after this Court's last direct consideration of the dual sovereignty doctrine in *Bartkus* and *Abbate*.

Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1145 (1995). As the criminal provisions of the federal code accumulated, any differentiation in the criminal law-enforcement role of the federal and state governments coordinately decreased.

The relative recency of the federalization of criminal law was captured in the report of an American Bar Association task force in 1998. The task force found that more than 40% of federal criminal provisions enacted since the Civil War – that is, the timeframe when the federal government began enacting general criminal statutes in realms traditionally governed by the states – had been enacted since 1970. Am. Bar Ass'n Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 7 (1998). This pace did not slow in the years that followed. Between 2000 and 2007, Congress enacted 452 new criminal laws, a rate of 57 new crimes per year. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Found. Legal Memo. at 1 (June 16, 2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf.

Because of this rapid expansion, "the bulk of federal criminal provisions now deal with conduct also subject to the states' general police powers." Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals*

and Mattress Tags to Overfederalization, 54 Am. U. L. Rev. 747, 754 (2005). And with respect to crimes historically policed by the states, "[d]ual federal-state criminal jurisdiction is now the rule rather than the exception." Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 997 (1995). In other words, the federal government has come to occupy much of the same role in criminal law enforcement as the states, eliding the historical distinction in the two sovereigns' interests in defining and prosecuting crime.

B. The Scope of Federal Criminal Law Has Become Practically Unknowable and Substantially Overlaps with State Criminal Law.

1. Federal criminal law has grown so substantially that accurately quantifying the number of federal criminal provisions is now all but impossible.

Efforts to count the number of federal criminal provisions have repeatedly been unsuccessful because of the stunning breadth of the federal criminal code. *See* Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, The Wall St. J. (July 23, 2011), https://on.wsj.com/2oKFAiM. The Justice Department made the first known effort to do so in the post-federalization era, and arrived at an estimate of 3,000 federal crimes created by statute. *Id.*

The American Bar Association made its own effort to count the number of federal criminal provisions in 1998. *See* American Bar Association Task Force on the Federalization of Criminal Law, *supra*. While it

ultimately did not succeed in arriving at an estimate of the size of the federal criminal code, it determined that the Justice department's decade-old conclusion of 3,000 was likely an underestimate of the number of federal criminal provisions. And this figure was exclusive of federal regulations that may be enforced criminally, which the ABA estimated to be approximately 10,000 by the end of 1996, and another estimate from 2008 placed at over 300,000. Baker, Jr., *Revisiting the Explosive Growth of Federal Criminal Law*, Heritage Found. Legal Memo. at 4.

By 2004, a new estimate placed the number of federal crimes at over 4,000.[7] John S. Baker, Jr., Federalist Soc'y for Law & Pub. Pol'y, *Measuring the Explosive Growth of Federal Crime Legislation*, 5 Engage 23, 23 (Oct. 1, 2004), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/BNvfVKmeVXx9uulnQbIvKotdpzytrAliLKLilhaX.pdf. An updated estimate by the same scholar in 2008 put the number of federal crimes created by statute at nearly 4500 – an increase of 1500 crimes in approximately 20 years, and of nearly 500 in just the last eight years of that period. Baker, *Revisiting the Explosive Growth of Federal Criminal Law*, at 1.

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[7] "Crimes," in this study, includes all provisions in the U.S. Code carrying a criminal penalty, regardless of whether they require a *mens rea* and therefore meet the common-law definition of "crime." Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, at 30.

2. The newly massive scope of federal criminal law is reflected in the federal courts' dockets. In 2003, Judge Guido Calabresi of the Second Circuit Court of Appeals estimated that appeals of convictions for federal crimes that also could have been prosecuted under state statutes accounted for thirty to fifty percent of the Second Circuit's overall appellate docket. *See* Guido Calabresi, *Federal and State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. Rev. 1293, 1297 (2003). This change, he said, was not salutary: "Apart from the dramatic change that such federalization effects in our federal system, making criminal law national rather than local causes great problems for the lower federal courts." *Id.* Other judges have echoed this concern. *See United States v. Wall*, 92 F.3d 1444, 1480 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) (stating "federal courts have been deluged with cases of late" in part because of "the federalization of state crimes by Congress," and stating that restraint in federalization would promote "not only state sovereignty . . . but the quality of justice in the federal courts."); *United States v. Crawford*, 982 F.2d 199, 206 (6th Cir. 1993) (Merritt, C.J., concurring) (citations omitted) ("Under the system of federalism devised by our founders and maintained until recently, federal prosecutors have not sought to displace the state systems of criminal justice in routine cases. This is no longer the case as routine street crime cases like this firearms case are brought in federal court in order to insure longer sentences under the sentencing guidelines and mandatory minimum sentencing laws . . . ."); *United States v. Hickman*, 179 F.3d 230, 242 (5th Cir. 1999) (en banc) (Higginbotham,

J., dissenting) ("With the increased federalization of traditional state crimes, the consequence of this acquiescence of the judiciary looms large. Not surprisingly, the increased overlapping of traditional state criminal statutes taxes the institution of Article III courts.").[8]

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[8] *See also United States v. Rutherford*, 236 F. App'x 835, 845 (3d Cir. 2007) (Ambro, J., concurring) ("By prosecuting Rutherford at the federal level, the Federal Government has effectively incapacitated a career criminal for the remainder of his adult life. To do so, however, it has overridden the default state criminal system in what looks like a classic state-law crime."); *United States v. Rrapi*, 175 F.3d 742, 756 (9th Cir. 1999) (Thomas, J., dissenting) (criticizing extension of federal bank robbery act to include off-premises ATMs as "an unwarranted and unnecessary judicial federalization of burglary – a crime well within the expertise of local law enforcement and the state courts."); *United States v. Snyder*, 136 F.3d 65, 70 (1st Cir. 1998) ("The continuing federalization of criminal law increases the frequency with which federal/state sentencing disparities occur."); *cf. United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (in light of federalization of criminal law, "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome."); *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[T]he recent expansion of federal criminal law jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well."); *United States v. Claiborne*, 92 F. Supp. 2d 503, 509 (E.D. Va. 2000), *aff'd*, 3 F. App'x 166 (4th Cir.

The federalization of criminal law is reflected in the number of criminal prosecutions pending in federal courts. In 1959, when *Bartkus* and *Abbate* were decided, there were 7,727 pending criminal cases in the federal courts at year-end. *See* Federal Judicial Center, Caseloads: Criminal Cases, 1870-2017, https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2017 (last accessed Sept. 10, 2018). Leaving aside outlier numbers of prosecutions in the Prohibition era (1920-1933),[9] the number of pending federal prosecutions at year's end continued to hover at or below 10,000 until the mid-1960s, when it began to rise steadily, reaching as many as 81,079 pending prosecutions at year's end 2010. *Id.* The number of pending federal prosecutions was 73,874 at the end of 2017 – a nearly tenfold increase from 1959. *Id.*

3. Nor does the federal criminal code in its modern iteration reflect a considered judgment about the circumstances and interests that should underlie a

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2001) ("Where the Commerce Clause has been broadly expanded and the line between federal and state crimes has been blurred to allow virtually every crime to be prosecuted in federal court under the auspice of 'affecting interstate commerce,' the rationale of the dual sovereignty doctrine is nullified and thus, the doctrine should be eliminated.")

[9] Between 1933 and 1934, the number of pending federal prosecutions dropped from 20,903 to 9,478. *See* Federal Judicial Center, Caseloads: Criminal Cases, 1870-2017, https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2017 (last accessed Sept. 10, 2018). The Twenty-First Amendment was ratified on December 5, 1933.

federal intrusion into traditional areas of state interest. Instead, "[t]he most distinctive feature of federal criminal law is that it had evolved piecemeal, with overlapping and often inconsistent statutes passed at different times in response to different national concerns." Jeffries, Jr. & Gleeson, *The Federalization of Organized Crime*, 46 Hastings L.J. at 1125.

The upshot of this scattershot and extensive federalization is that "many federal statutes duplicate state laws by prohibiting the same or similar conduct and enabling federal prosecutors to bring charges to protect interests no different than those that state laws address." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 654–55 (1997). The types of general crime now subject to federal as well as traditional state control include "drug trafficking, firearms offenses, certain forms of theft and embezzlement, arson, fraud committed by mail or telephone, bank fraud, robbery and extortion, fraudulent use of credit cards, and auto theft . . . ." *Id.*; *see also* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997) (listing as federalized state crimes "virtually all drug crimes, carjacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from an insurance company, and murder of a state official assisting a federal law enforcement agent."); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 512 n.9 (1994).

To be sure, "some duplicative federal crimes require proof of elements not present in the definition of state crimes, such as a connection to interstate commerce or use of the mail." Clymer, *Unequal Justice*, 70 S. Cal. L. Rev. at 655. But "these elements do not ensure that prosecutions are limited to cases involving unique or significant federal interests." *Id.* As long as these often minimal requirements to bring a state crime within federal jurisdiction are met, whether there is a federal "interest" is no limitation on the federal government's ability to prosecute quintessentially state-level crimes. There is no dispute that "federal prosecutors do employ duplicative federal statutes in cases that involve distinct federal interests, such as prosecutions of national and international fraud and drug conspiracies, but they also can (and often do) use them when no such federal interests are at stake." *Id.* at 655.

4. The federal offenses that overlap with state crimes, and criminalize conduct traditionally regulated by the states, are far too numerous to list. Nevertheless, the following examples illustrate the extent of federal occupation of the traditional state role. These are not all necessarily examples of the most common prosecutions for federal crimes, but rather demonstrate the nature of federalization.

Drug crimes. The overlap in federal and state criminal drug laws is well-documented. *See, e.g.*, Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. at 834, 839. The judiciary has long recognized the problems for both case administration and the balance of federal-state authority that mass

federalization of drug laws can cause. *See* Fed. Courts Study Comm., Judicial Conf. of the U.S., *Report of the Federal Courts Study Committee*, at 6 (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf (describing "deterioration in the indices of federal judicial performance" brought on by surge in trials from the "expanded federal effort to reduce drug trafficking"); *id.* at 15-16 (recommending demarcation between state and federal responsibilities in prosecuting drug trafficking in order to "conform to the principles of federalism."); *id.* at 35-36 (recommending federal prosecutors limit drug charges to those that "cannot or should not be prosecuted in the state courts," and noting that drug filings have fueled increase in federal criminal cases). While the largest trafficking cases may benefit from federal expertise, many low-level cases wind up the subject of federal prosecutions as well. *See* 1 LaFave et al., *Criminal Procedure* § 1.2(d), at 84 n.333 (quoting study stating that "some 36 percent of all sentenced drug offenders in the federal system could be classified as 'low-level drug law offenders'").

Gun crimes. Federal gun prosecutions similarly have risen precipitously since the early 1990s. The number of federal gun possession prosecutions doubled between 1991 and 2001, and nearly tripled between 1991 and 2006. David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 Cardozo L. Rev. 1427, 1441 (2011). In 1997, the city of Richmond, Virginia announced a policy known as "Project Exile," which mandated that all criminal firearm offenses would be prosecuted federally if a federal statute applied. *See* Daniel C. Richman,

"Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 379 (2001). This decision was made not because federal authorities had a particular interest in Richmond-based gun crimes, but specifically to obtain certain aspects of federal criminal law – such as pre-trial detention and longer sentences – in order to advance local interests. *Id.* at 379-80; *see also* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1311 n.163 (2005).

Carjacking. Under 18 U.S.C. § 2119, any person who takes from another person, by force and violence or by intimidation, a car that has been shipped or received in interstate or foreign commerce, with the intent to cause death or serious bodily harm, is guilty of a felony and subject to a fine and up to 15 years' imprisonment if no injury occurs, 25 years' if serious bodily injury occurs, and capital punishment if death occurs. *See* 18 U.S.C. § 2119. Such conduct is already covered under the criminal law of every state, as robbery and otherwise. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 708 & n.29 (2005); *see also* Mary C. Michenfelder, Note, *The Federal Carjacking Statute: To Be or Not to Be? An Analysis of the Propriety of 18 U.S.C. § 2119*, 39 St. Louis U. L.J. 1009, 1012 (1995) (arguing that "[c]arjacking is predominantly a state crime and states have proven successful in its prosecution and punishment," and that "[a]n examination of the crime of carjacking and its impact upon federal courts reveals no clear need for federal presence to combat this state crime.").

Hate crimes. Often passed in circumstances that rightly inspire outrage, hate crimes legislation also federalizes conduct that already is criminal under state law. For example, the Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. § 247, provides punishment for conduct such as kidnapping, sexual abuse, homicide, arson, and battery, each of which does not require a federal statute to be criminally prosecuted. *See* 18 U.S.C. § 247; *see also* 18 U.S.C. § 249 (punishing homicide, kidnapping, assault, or battery against a victim chosen on the basis of race, color, religion, national origin, gender, sexual orientation, gender identity, or disability). Despite the additional intent and interstate commerce elements of such statutes, the core conduct required for prosecution is an underlying crime traditionally falling within state prosecutorial powers. *Cf.* Scott Wallace, *Creative Coalitions: New Brakes on Congress's Drive to Federalize Crime*, 11 Fed. Sent'g Rep. 3, 1998 WL 1113332 (Vera Inst. Just.) (Dec. 1, 1998) (arguing insufficient consideration taken of state criminal laws during debate over proposed hate-crime bill in 1998). The potential for double punishment of such conduct implicates successive prosecution concerns, and calls into question the dual sovereignty doctrine. *See, e.g.*, Frederick M. [illegible]nce, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 Stan. L. & Pol'y Rev. 251, 277 (2008) (noting, in discussion of the Hate Crimes Prevention Act of 2007, that "it is not easy to defend a doctrine that allows a defendant to be tried twice for what is in reality the same crime."); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics,*

Expressive Law, or Tool for Criminal Enforcement?, 80 B.U. L. Rev. 1227, 1275 (2000) (arguing that "cooperative federalism" model of criminal enforcement calls into question the dual sovereignty doctrine).

Murder-for-hire. The federal murder-for-hire statute, 18 U.S.C. § 1958(a), provides that "[w]hoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed *in violation of the laws of any State or the United States* as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so," may be punished with a series of escalating penalties up to the death penalty, depending on whether death resulted. 18 U.S.C. § 1958(a) (emphasis added). This statute explicitly piggybacks the ability to bring a federal prosecution on state laws already outlawing the same conduct, with an "interstate commerce" requirement appended to bring the statute within Congress's constitutional powers.

Because of the dual sovereignty doctrine, § 1958 provides a mechanism to obtain duplicative or inconsistent outcomes on a murder-for-hire charge, depending on the circumstances. The latter occurred in 2002, when a Texas man was convicted under § 1958 after he had been acquitted by a Texas jury for the same murder-for-hire plot. *See* David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 Wash. U. L.Q. 765, 768-69 (2003). The federal investigators assigned to the case were even able to "interview[] members of the

jury that acquitted [the defendant], questioning them as to what evidence and aspects of Texas's case led them to return the not-guilty verdict." *Id.* at 769.

C. The Expanding Scope of Federal Criminal Law Has Vitiated Federalism Protections Formerly Inherent In the Dual Sovereignty Doctrine.

The principal federalism benefit of the dual sovereignty doctrine is, in theory, to prevent a state or the federal government from preventing vindication of the others' unique interest in a prosecution by rushing to the courthouse or otherwise obtaining a less serious punishment than the other would consider sufficient. Historically, the Court's concern was for the "undesirable consequences" that might result if a state's criminal case prevented federal prosecution of activity that "impinge[s] more seriously on a federal interest than on a state interest," *Abbate*, 359 U.S. at 195, or a federal prosecution prevented vindication of a primarily state interest, *see Bartkus*, 359 U.S. at 137. In other words, this Court described the power of each "sovereign" to prosecute as an incident of our federalist system, bolstering the proper allocation of power between the federal government and the states.[10]

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[10] To be sure, this Court stated in *Heath v. Alabama* that "it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Government in our federalist system, that constitutes the basis for the dual sovereignty doctrine." 474 U.S. 82, 90–91 (1985) (holding successive prosecutions by separate states

This rationale may have been required before incorporation of the Fourteenth Amendment. And it may have been sensible when the federal government and the states largely prosecuted conduct within separate spheres, when any overlap in conduct covered by criminal prohibitions was likely incidental to the separate interests captured by the federal and state criminal prohibitions at issue. Indeed, "[t]he dual sovereignty doctrine was introduced and developed during eras of federalist sentiment characterized by strident assertions of state sovereignty." Dominic T. Holzhaus, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 Colum. L. Rev. 1697, 1705 (1986). As this Court's rationale in *Bartkus* and *Abbate* demonstrated, the doctrine addressed the concern that prosecution under a narrow area of federal interest would not fully vindicate the general police protection interests of the states, or that a general state prosecution would not take sufficient account of the narrow but important areas of federal interest. Even

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not barred by Double Jeopardy Clause). But while the states' and federal government's "independent sovereign authority" makes the dual sovereignty doctrine *possible*, it does not answer the question whether that independent sovereign authority requires the dual sovereignty doctrine between the federal government and the states, as a matter of constitutional interpretation of the Fifth Amendment. *Abbate* and *Bartkus* made quite clear that the dual sovereignty doctrine was justified, at least in the federal-state context, as a matter of the relationship between the sovereigns in our federalist system.

in the relatively rare instances where the same conduct was regulated by both federal and state authorities, the states and federal government could be understood to have sufficiently unique interests in enforcing their criminal prohibitions that, in those well-defined areas, the potential for dual prosecution did not substantially impair the individual liberty interests protected by the Double Jeopardy Clause. *See, e.g., Lanza*, 260 U.S. at 381 (stating that Eighteenth Amendment's grant of power to Congress and reservation of power to states to enforce Prohibition was adopted to preserve extant state power, in order to "put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits.")

Now, however, "the dual sovereignty doctrine presents an inaccurate factual description of the relationship between the state and federal governments in the area of criminal law." Braun, *Praying to False Sovereigns*, 20 Am. J. Crim. L. at 10. This Court did not and could not have anticipated the expansive federalization of criminal law. And as federal criminal law has expanded into most areas that were historically the province of state criminal law, the individual liberty interest protected by the Double Jeopardy Clause, *see* Pet'r Br. 29-30, has been overwhelmed by the nearly universal potential for dual prosecution and punishment of historically state-regulated criminal behavior. The upshot is that, for most state crimes, the Double Jeopardy Clause is currently almost no guarantee against successive prosecution, contrary to the Clause's intended role and the liberty interests of citizens charged with a crime.

Indeed, both the federal government and the states pay a high federalism price under the dual sovereignty doctrine. Although justified as a boon to federalism, the dual sovereignty doctrine in its current operation privileges federal interests – or federal prosecution in areas that are properly understood as primarily being of state interest – at the expense of the states. Because federal criminal law was initially quite circumscribed, the expansion of federal criminal law has come at the expense of states' traditionally exclusive criminal jurisdictions. And while states remain free to punish behavior falling within these areas of interest, their ability to instill fixed or proportionate penalties has eroded in light of the ability of federal prosecutors to tack on additional penalties to conduct already criminalized by the states. Indeed, each of the ostensibly separate sovereigns suffers from the possibility that a successive, and cumulative, prosecution by the other will override its judgment about the appropriate punishment. "In sum, because the federal government need not preempt or displace state laws in passing comparable federal criminal laws, states have no grounds on which to challenge the growing scope of the federal law enforcement establishment." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1180 (1995).

D. The Federalization of Crime Undermines the Practical Rationale for the Dual Sovereignty Doctrine.

Not only has federalization of criminal law undermined the federalism rationale for the dual sovereignty doctrine, but it has also exposed an increasing number of defendants to the very ills that the Double Jeopardy clause was designed to prevent: second attempts at unsuccessful prosecutions, and "multiple punishments for the same offense." *See Whalen v. United States*, 445 U.S. 684, 688 (1980) (quotation marks omitted); *Green v. United States*, 355 U.S. 184, 187 (1957). As the federalism benefits of the doctrine are eroded by the federal government's wholesale move into prosecution of general crimes based on the same interests as the states, the harm to individual defendants becomes all the more egregious as the possibility of dual prosecutions, once thought a rarity, becomes reality for more and more criminal defendants. Simply put, "[t]he federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions." Meese, III, *Big Brother on the Beat*, 1 Tex. Rev. L. & Pol. at 22.

With respect to the possibility of double punishment, "it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting); *see also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). And dual punishment can be particularly unfair for federal prosecution of traditionally state-regulated crimes, because federalization often "provides harsher

penalties than those available at the state level." Guerra, *The Myth of Dual Sovereignty*, 73 N.C. L. Rev. at 1167. For example, federal "law prescribes stiff mandatory minimum sentences and . . . maximum penalties for drug offenses. Under the Continuing Criminal Enterprise statute, a person convicted of any of the most serious drug felonies will receive a mandatory life sentence. The statute also authorizes the death penalty for an intentional killing committed in furtherance of a continuing criminal enterprise." *Id.* at 1167–68. With nearly every state crime now subject to potential double punishment because of mass federalization, these concerns have come to overwhelm whatever federalism benefit remains from the dual sovereignty doctrine.

An acquitted defendant's interest in not being subject to a second trial for the same conduct, meanwhile, is quintessential to the Double Jeopardy Clause's protections. As this Court has explained, "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) (citation omitted). Indeed, the very purpose of a successive prosecution may be to overcome an acquittal by a "separate" sovereign. *See, e.g., United States v. Angleton*, 221 F. Supp. 2d 696, 700 (S.D. Tex. 2002) (permitting federal prosecution after FBI agents interviewed jurors in unsuccessful state prosecution), *aff'd*, 314 F.3d 767 (5th Cir. 2002). With federal statutes available to retry essentially any acquitted state defendant, the dual sovereignty doctrine greatly

diminishes the guarantees of the Double Jeopardy Clause.

* * *

In light of the changed face of federal criminal law since the 1950s, the dual sovereignty doctrine no longer reflects sound federalist policy as it did when the dual sovereignty doctrine was last considered. Aligning the protections of the Double Jeopardy Clause with the practical reality of increasing federalization should encourage more judicious use of federal legislation and federal prosecutorial power when matters of primary importance to the states are at issue, and more accurately reflect the interest in federalism in the era of federalization of criminal law.

II. The Dual Sovereignty Doctrine Complicates Legislators' Task When Fixing Criminal Punishments.

This Court's dual sovereignty cases recognize the importance of sovereigns' ability to align their particular interests with the punishment they choose to impose for criminal conduct. Both *Bartkus* and *Abbate* describe the possibility that divergent federal and state interests may lead to vastly different punishments for similar conduct. *See Bartkus*, 359 U.S. at 137 ("It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States."); *Abbate*, 359 U.S. at 195 ("[A] disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest.").

However, when the federal government applies criminal sanctions to conduct already penalized by the states and that is historically the states' responsibility to regulate, the dual sovereignty doctrine upsets each sovereigns' ability to align criminal punishments with its particular interests. For instance, if a state decides particular conduct should be punishable by no more than 5 years' imprisonment, and the federal government decides that it should be punishable by no more than 7 years' imprisonment, because of the dual sovereignty doctrine, that conduct exposes an individual to 12 years' imprisonment – significantly more than either sovereign believed to be in its interest.

By the same token, the dual sovereignty doctrine frustrates legislators' efforts to craft appropriate criminal sanctions. Legislators already face uncertainty when only one sovereign is involved; regardless of the penalties the legislature prescribes, there is always a question about how aggressively the statute will be enforced. The dual sovereignty doctrine further complicates legislators' task. A legislator cannot be certain about how other sovereigns will address the same conduct under their laws, or the degree to which state and federal prosecutors will coordinate or defer to each when enforcing those laws. Thus both state and federal legislators are left with little ability to understand how severely particular conduct will be punished under the laws they write.

For example, a state legislator seeking to fully vindicate state interests, may find the state interest overwhelmed by federal legislation and prosecution

that would permit, through consecutive punishment, a far more substantial prison term than the state legislator would find appropriate. Conversely, a federal legislator who undershoots her preferred punishment to fully vindicate federal interests, based on the possibility that a cumulative state prosecution would, in tandem, satisfy without overshooting those interests, risks that a subsequent state prosecution never comes, thereby leaving the federal interest underprotected.

In this way, far from protecting the interest of each separate sovereign in our federalist system, the dual sovereignty doctrine can prevent either from being able to achieve their preferred ends. This concern is paramount to *amicus*, who is tasked with making these difficult judgments. It is critical that legislators be able to reasonably predict the effects of criminal legislation, and fostering such certainty is critical to a legislator's task of balancing individual liberty and governmental interests. The dual sovereignty doctrine, however, in conjunction with the massive federalization of criminal law, ensures that legislators will always be shooting at a moving target when attempting to fix appropriate criminal penalties.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court overrule its holdings in *Bartkus* and *Abbate* and put to rest the dual sovereignty exception to the Double Jeopardy Clause as applied to subsequent federal-state or state-federal prosecutions. The extensive federalization of criminal law has rendered ineffective the federalist underpinnings of the

dual sovereignty doctrine, and its persistence impairs full realization of the Double Jeopardy Clause's liberty protections.

Respectfully submitted,

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Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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INTEREST OF AMICI CURIAE

Amici curiae are professors of criminal law, constitutional criminal procedure, and related disciplines who have studied, taught, written about, and litigated cases involving the Double Jeopardy Clause. Amici believe this case presents fundamental issues of double jeopardy law that concern our constitutional structure.*

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* No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution to fund its preparation or submission. Counsel for all parties received timely notice of amici's intent to file this brief; all parties have consented to its filing.

The views expressed herein are those of the individual amici, not of any institution or group with which they are affiliated.

SUMMARY OF THE ARGUMENT

The Fifth Amendment guarantees that, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." Yet that is precisely what happened to Terance Martez Gamble. The State of Alabama prosecuted and convicted him for being a felon in possession of a firearm. Subsequently, the United States initiated a second prosecution for what all parties have assumed is definitionally the same offense, yielding a second conviction. That second, duplicative prosecution and conviction violated the letter and spirit of the Double Jeopardy Clause.

As a matter of the Framer's understanding, as a matter of this Court's theoretical justifications for double jeopardy, and as a matter of policy respecting multiple prosecutorial powers, the United States should not be considered a double jeopardy sovereign that is completely independent of its constituent States. This Court ought to restore the double jeopardy right to its proper constitutional position, holding that as between the United States and Alabama, there is not—and never should have been—a "dual sovereignty" exception to the double jeopardy bar when identical offenses are prosecuted.

There is evidence that the Double Jeopardy Clause's straightforward text was understood at the time of the framing to protect very broadly against second prosecutions, regardless of the identity of the sovereign. *See* Br. of Amici Curiae Law Professors in Supp. of Pet'r 1 ("At the Founding and for several decades thereafter, a prosecution by one sovereign was understood to bar a subsequent prosecution by all other sovereigns."); *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) ("[I]t has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction."). Although at first this might seem a surprising limit on prosecutorial power, upon reflection it is a most sound one. Without some reason to question the legitimacy of that first prosecution—and thereby to question the very legitimacy of the first sovereign—there is no utilitarian or retributive justification for bringing prosecutorial power to bear against the defendant a second time. A sovereign-agnostic conception of double jeopardy protection is therefore rooted in respect for coordinate jurisdictions and in notions of limited government power.

It was meant to be a simple case, then, when—as here—the alleged authority for the attempted second prosecution for an identical offense "derive[s] from the same 'ultimate source'" as that of the first. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). In creating our federal structure, "[t]he Framers split the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)

(Kennedy, J., concurring), "divid[ing it] between the government of the Union, and those of the states," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Framers did not *clone* or *duplicate* sovereignty. Otherwise, the very core of our governing structure would be impossible, as an *independent* sovereign can never be *supreme* over another. *See* U.S. Const. art. VI. It is not surprising, then, that the Framers rejected proposed language that, most plausibly read, would have limited the Fifth Amendment double jeopardy bar to multiple federal prosecutions. *See* The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 467 (Neil H. Cogan ed., 2d ed. 2015) (chronicling the rejection of George Partridge's proposal to add the limiting phrase "by any law of the United States" after the current draft's "same offence"); *see also Abbate*, 359 U.S. at 203-04 (Black, J., dissenting).

Today, we have a very different conception of the scope and frequency of federal criminal prosecution than did the Framers. But changes in federal policy do not trump constitutional rules. What is more, there is not even a conflict in policy. The many and varied federal and state crimes that coexist today create a system of vast prosecutorial discretion. Moreover, applying this Court's long-standing interpretation of what definitionally constitutes the "same offence" reveals that this substantial discretion exists even where there has already been a prosecution concerning a particular historic event. Indeed, it is possible that even the crimes at issue in this very case are two

different offenses under *Blockburger v. United States*, 284 U.S. 299 (1932).[1] *See* 18 U.S.C. § 922(g)(1) (2012) (requiring "a crime punishable by imprisonment for a term exceeding one year" and also "affecting commerce"); Ala. Code § 13A-11-72(a) (2018) (incorporating diverse predicate offenses); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (explicating "a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws").

It is an almost impossible claim, therefore, that acknowledging a double jeopardy prohibition against duplicative state and federal prosecutions could seriously hamper the prosecutorial prerogatives of either the state or federal governments. There will be exceedingly few 'races to the courthouse' because so many avenues are open to both state and federal prosecutors. But in the rare instance when the second prosecution is for the identical offense already prosecuted, the text and animating purposes of the Double Jeopardy Clause dictate that the courthouse door should be closed.

Thus, on first blush, it is surprising to see this Court's historic pronouncements in favor of a federal/state dual sovereignty exception. A close look at those opinions, however, is revealing. Not only were the strongest pronouncements perhaps influenced by contexts of arguable federal crisis, *see* Br. of Amici

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[1] Amici take no position on whether such argument has been forfeited in this case; what we emphasize is that, under *Blockburger*, there is not even strongly reasoned policy for preserving a dual sovereignty exception.

Curiae Law Professors in Supp. of Pet'r 7-17, but all of the early cases stated the proposition in dicta, and they did so long before this Court settled on the *Blockburger* interpretation of same offense. Most importantly, this Court has never reconsidered the dual sovereignty exception after holding in 1969 that the double jeopardy protection is—contrary to the Court's earlier conception—incorporated as against the States. *Compare Benton v. Maryland*, 395 U.S. 784, 787 (1969) (incorporating the right), *with Bartkus v. Illinois*, 359 U.S. 121, 124-28 (1959) (discussing incorporation).

Considered in context, therefore, a rejection of a federal/state dual sovereignty exception would follow in the pattern of this Court's precedents. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (rejecting a previous federal/state exception to the Fifth Amendment privilege against compelled self-incrimination); *Elkins v. United States*, 364 U.S. 206 (1960) (rejecting a previous federal/state exception to the Fourth Amendment exclusionary rule). If a state police officer's decisions can, as the Court held in *Elkins*, effectively bind a federal prosecution; and if a State's grant of prosecutorial immunity can, as the Court held in *Murphy*, effectively bind a federal prosecution; then it is hardly surprising that a State's *prosecution* should do the same. *See United States v. Balsys*, 524 U.S. 666, 683 (1998) ("After *Murphy* . . . the state and federal jurisdictions *were as one* . . . ." (emphasis added)).

In short, when it comes to the power of the United States to prosecute the identical offense already prosecuted by a constituent State, any purported "dual

sovereignty" exception to the double jeopardy right is not supported by constitutional text, history, political theory, or even by good policy.

ARGUMENT

I. The drafting history of the Double Jeopardy Clause strongly suggests that the Framers rejected a dual sovereignty exception.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." When an early draft of the Clause was being debated in Congress, one member of the House of Representatives proposed an amendment that would have limited the Clause to federal offenses. That proposed amendment was rejected.

This significant detail of the Clause's drafting history has gone virtually unmentioned in the Court's jurisprudence. *But see Abbate v. United States*, 359 U.S. 187, 203-04 (1959) (Black, J., dissenting) (briefly mentioning the rejected amendment). The rejection of the amendment strongly suggests, however, that the framers and ratifiers of the Clause understood that it would apply to *any* successive federal prosecution, whether that prosecution followed a prior federal prosecution or a prosecution by a State.

On Aug. 17, 1789, the House of Representatives was considering the proposed Double Jeopardy Clause in

the form submitted to it by James Madison: "No person shall be subject, [except] in "cases" of impeachment, to more than one trial or one punishment for the same offence . . . ." 1 Annals of Cong. 781 (1789) (Joseph Gales ed. 1834).[2] After an unrelated motion by Rep. Egbert Benson was defeated, Rep. George Partridge of Massachusetts "moved to insert after 'same offence,' the words 'by any law of the United States.' " *Id.* at 782. But "[t]his amendment was lost also." *Id.* Had the Partridge motion passed, the Clause would then have read: "No person shall be subject except in cases of impeachment, to more than one trial or one punishment for the same offence by any law of the United States."

Unfortunately, there is no record of the debate or the numerical vote on this motion. Its rejection therefore seems susceptible of three interpretations.

First, perhaps the motion was meant to limit the double jeopardy constraint to the federal government, such that its rejection broadens the constraint to similarly prohibit the States from prosecuting twice for the same offense. *See* Jay A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 30-31 (1969) (suggesting that the motion's defeat implies "that double jeopardy may have been intended to apply to the states and the federal government alike"). This interpretation is highly implausible for at least two reasons. First, in no place in the Bill of Rights except for the first word of the First Amendment ("Congress"), and

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[2] The Annals of Congress erroneously omits the word "except."

in the phrase "any court of the United States" in the Seventh Amendment, is there an explicit limitation of the Bill to the federal government.[3] Yet, as far as we know, there were no other efforts to clarify the limited scope of the Bill; had a Member of Congress wanted to include such a limitation, there are many other places where he would have done so. It would have seemed far more obvious, for example, to include such a limitation at the beginning of what became the Sixth Amendment, which begins: "In *all* criminal prosecutions . . ." U.S. Const. amend. VI (emphasis added).

No such limitations were proposed because the common understanding of the founding generation was that the Bill implicitly bound only the federal government and not the States. As this Court said in *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), the Constitution's "limitations on power, if expressed in general terms, are naturally, and . . . necessarily, applicable to the government created by the" Constitution, i.e., the federal government. The Court reached this unanimous conclusion without "much difficulty." *Id.*

The second reason that such an interpretation is not plausible is that Rep. Partridge was a Federalist, and a pro-administration Federalist at that. *See* John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. Pol. 295, 322

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[3] The first two proposed amendments, which went unratified in 1791, also explicitly applied only to the federal government. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8-19 (1998).

(1993). As such, Partridge would have had no interest in limiting the reach of the Bill solely to the federal government. To the contrary, Federalist ideology supported the enhancement of the powers of the federal government at the expense of the powers of the States. For him to have moved to clarify that a constraint in the Bill of Rights applied only to the federal government and did not apply to the States would have made little sense.

Second, Partridge could have been using the word "law" to mean only statutory—not decisional—law, attempting to limit the Double Jeopardy Clause to only statutorily defined crimes and not common law crimes. Such an interpretation might be consistent with his political inclinations, given that such a move would enhance federal power by limiting the constraints of the Clause. But this interpretation is implausible for a separate reason.

Partridge would have known that the only basis for federal jurisdiction over federal crimes was the first clause of Article III, Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, *the Laws of the United States*, and Treaties made, or which shall be made, under their Authority . . . ." (emphasis added). If this judicial authority included the power to recognize and adjudicate federal common law crimes, then the phrase "the Laws of the United States" would necessarily include common law. Thus, pursuant to this second interpretation, Partridge would have believed both (1) that "laws of the United States" in Article III included the common law but, (2) that his proposed, virtually identical "law of the

United States" included only statutory law. That is implausible, to say the least.

Third, and most plausibly, by rejecting the Partridge motion, the framers of the Double Jeopardy Clause could have been rejecting the very dual sovereignty exception that this Court later created in *United States v. Lanza*, 260 U.S. 377 (1922), and reaffirmed in *Abbate*, 359 U.S. at 195. That is precisely how Justice Black understood the failed motion. *See id.* at 204 (Black, J., dissenting) ("I fear that this limitation on the scope of the Double Jeopardy Clause, which Congress refused to accept, is about to be firmly established as the constitutional rule by the Court's holding in this case . . . ."). Partridge, a pro-administration Federalist, likely understood that without his proposed limiting phrase, the Clause would be understood as forbidding a federal prosecution following a prior prosecution for the "same offence," whether that first prosecution was by the federal government *or by a State*.

Given the lack of historic record, we of course cannot be sure who voted to defeat Partridge's motion, nor why they did so. We can, however, make some educated guesses. Because Federalists greatly outnumbered Anti-Federalists in the First Congress, presumably it required a bloc of Anti-Federalists and anti-administration Federalists—a bloc that would soon achieve political dominance as Jeffersonian Republicans, *see* Aldrich & Grant, *supra*, at 301—to defeat the motion. They likely did so to give the Clause, and the rest of the Bill of Rights, the full import of their Anti-

Federalist design: to limit federal prosecutorial power in favor of that of the States.

The Bill of Rights was demanded by the Anti-Federalists in large part because they wanted to maintain the states' virtual monopoly on criminal justice. Some Anti-Federalists went so far as to claim that Congress's authority to define and punish crimes did not extend past the four crimes expressly enumerated in the Constitution. *See* Adam H. Kurland, *First Principles Of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 Emory L.J. 1, 54 (1996). Some Jeffersonian Republicans later repeated this claim, including Thomas Jefferson himself. *See* Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* The Virginia and Kentucky Resolutions of 1798 and '99 16 (Jonathan Elliott ed. 1832). Even those in the founding generation who did not share this rather extreme position saw a very limited role for the federal government to mete out criminal punishment. After all, the Anti-Federalists feared that the new, powerful central government might abuse whatever power it was given to create, prosecute, and punish crime, in order to oppress its enemies. *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 158-59 (2001). They sought to keep that power tightly cabined via a set of procedural restrictions that became a large portion of the Bill of Rights.

In this manner, the power to punish crime would overwhelmingly remain where it had been, in some instances, for over a century and a half: with the States.

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STATEMENT OF INTEREST[1]

Amici are criminal defense practitioners with years of experience defending individuals in federal and state criminal prosecutions, and criminal law professors with years of experience examining the criminal justice system. Given their frequent interactions with prosecutors and forums across multiple sovereigns and their study of criminal justice, *amici* are uniquely positioned to explain how discarding the so-called "separate-sovereigns" exception to the Double Jeopardy Clause will enhance the criminal justice system by providing appropriate incentives to both prosecutors and defendants, while encouraging Congress to identify unique federal elements that justify criminalizing conduct at the national level. The resulting improvements to the criminal justice system will inure to the benefit of all parties to that system—prosecutors, defendants, defense counsel, lawmakers, and courts alike—and, in turn, to the public at large.

A full list of *amici* is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Elimination of the judicially created "separate-sovereigns" exception to the Double Jeopardy Clause not only makes sense as a matter of doctrine but also

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

would properly align incentives for prosecutors, defendants, and lawmakers on the local, state, and federal levels. In fact, nearly half of the states already prohibit prosecutions based on conduct previously prosecuted in federal court. Those state-law prohibitions have not created any undue obstacles to efficient criminal law enforcement.

Even without the judge-made separate-sovereigns exception, prosecutors for the second-in-time sovereign—whether federal or state—would remain capable of bringing a second prosecution so long as the offenses were, in fact, different. Under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), and its progeny, two offenses are sufficiently different for purposes of the Double Jeopardy Clause provided each contains an element that the other does not. That inquiry allows successive prosecutions for different offenses and incentivizes sovereigns to focus their criminal prohibitions on conduct that implicates their distinct concerns in our federal system. In particular, employing *Blockburger* rather than the separate-sovereigns exception incentivizes Congress to consider whether there is truly a distinct federal interest that justifies enacting a separate federal criminal offense and thus deters the overfederalization of criminal law and avoids wasted resources in the re-prosecution of crimes already prosecuted at the state and local levels.

Eliminating the separate-sovereigns exception would also facilitate plea bargaining, a practice that this Court has recognized enhances the administration of criminal justice. At present, the separate-sovereigns exception deters plea bargaining

because a guilty plea in a first-in-time prosecution can be used as near-conclusive evidence of guilt in a second-in-time prosecution by another sovereign. As a result, cases that could be efficiently resolved by a guilty plea needlessly consume significant resources of prosecutors, defense counsel, and the courts. Eliminating the separate-sovereigns exception will remove that artificial impediment to plea bargaining.

Finally, eliminating the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government or a state government. In our federal system, there is no reason for individuals to be subject to double jeopardy based on the identity of the second-in-time sovereign. The evolution and application of this Court's incorporation doctrine is one of the intervening legal developments that justifies reconsideration of the separate-sovereigns exception. And that same incorporation doctrine requires that the Double Jeopardy Clause must apply equally to the federal government and state governments. That result only makes sense in our federal system. Indeed, ensuring that both the federal and state governments are bound by a liberty-preserving provision like the Double Jeopardy Clause is critical to ensuring that the promise of the Framers that being subjected to two sovereigns would enhance, not reduce, liberty is fully realized.

ARGUMENT

I. Eliminating The Separate-Sovereigns Exception Will Not Impede, But Will Enhance, The Orderly Administration Of Criminal Justice In Our Federal System.

The separate-sovereigns exception has been justified on the basis of the supposed "undesirable consequences" that would follow if prosecution by one sovereign barred prosecution of the same offense by another sovereign. *Abbate v. United States*, 359 U.S. 187, 195 (1959); *see* U.S. Br. in Opp. to Cert. 7. Specifically, the United States has argued here that, "if a federal prosecution could bar [subsequent] prosecution by a State, the result would be a significant interference with the States' historical police powers." U.S. Br. 7. And if a state undertook the first prosecution, the United States contends, "'federal law enforcement must necessarily be hindered.'" *Id.* (quoting *Abbate*, 359 U.S. at 195).

These concerns are vastly overstated. As an initial matter, almost half of the states *already* bar a state prosecution based on conduct that has previously been prosecuted in federal court. Frequently these prohibitions are a matter of state statutory law; for example, California law provides that "[w]hen an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state." Cal.

Penal Code §793.[2] In other states, comparable prohibitions are enshrined in the state constitution. *See, e.g.*, *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) (holding that subsequent state prosecution following federal-court acquittal for the same crime is unconstitutional under state Double Jeopardy Clause). But in either case, the profusion of these proscriptions dramatically undercuts the contention that eliminating the separate-sovereigns exception would result in "significant interference with the States' historical police powers," or that the exception is necessary to the orderly administration of criminal justice.

More fundamentally, the absence of the separate-sovereigns exception would not mean that the federal government or state governments will be left without means to vindicate their distinct sovereign interests when prosecuting crimes. Any concerns that overruling the separate-sovereigns exception would leave the criminal law of a second-in-time sovereign unvindicated are better addressed by this Court's longstanding *Blockburger* doctrine, articulated in

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[2] *Accord* Ark. Code Ann. §5-1-114; 11 Del. Code Ann. tit. 11, §209; Ga. Code Ann. §16-1-8; Haw. Rev. Stat. §701-112; Idaho Code Ann. §19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code Ann. §35-41-4-5; Ky. Rev. Stat. Ann. §505.050; Minn. Stat. Ann. §609.045; Miss. Code Ann. §99-11-27; Mont. Code Ann. §46-11-504; Nev. Rev. Stat. Ann. §171.070; N.J. Rev. Stat. §2C:1-11; N.Y. Crim. Proc. §40.20.2; N.D. Cent. Code Ann. §29-03-13; Okla. Stat. Ann. tit. 22, §§130-131; 18 Pa. Cons. Stat. and Cons. Stat. Ann. §111; Utah Code Ann. §76-1-404; Va. Code Ann. §19.2-294; Wash. Rev. Code Ann. §10.43.040; Wis. Stat. Ann. §939.71; *see also Commonwealth v. Cepulonis*, 373 N.E.2d 1136, 1141 (Mass. 1978) (generally adopting "same evidence" test to decide when a prior federal prosecution will bar a subsequent state prosecution).

Blockburger v. United States, 284 U.S. 299 (1932), and its progeny.

The *Blockburger* doctrine sets forth the "established test for determining whether two offenses" arising from the same act or transaction "are sufficiently distinguishable to permit" a prosecution for the second offense following a prosecution for the first offense notwithstanding the Double Jeopardy Clause. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Under *Blockburger*, two criminal offenses are not the "same offense" for double jeopardy purposes if each offense "requires proof of a fact which the other does not." 284 U.S. at 304. This test "emphasizes the elements of the two crimes," *Brown*, 432 U.S. at 166, and indeed has been described as the "same-elements test," *United States v. Dixon*, 509 U.S. 688, 696 (1993). In short, if "each offense contains an element not contained in the other," they are different offenses for purposes of the Double Jeopardy Clause. *Dixon*, 509 U.S. at 696.

Because of the separate-sovereigns exception, the *Blockburger* test has typically been applied only within a single sovereign—*i.e.*, to determine whether a single sovereign (a state or the federal government) may prosecute a second offense following its own prosecution of a first offense. At least in federal court,[3] there has yet been no occasion to apply the

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[3] A number of states that already prohibit subsequent prosecutions for the same offense across sovereigns have employed a *Blockburger*-like test to permit a subsequent state prosecution when the state and federal crimes are not the "same offense." *See, e.g.*, *People v. Dipre*, 70 N.Y.S.3d 823 (N.Y. Sup. Ct. 2018); *People v. Halim*, 223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017).

Blockburger test across two sovereigns—*i.e.*, to determine whether one sovereign may prosecute a second offense following a prosecution of a first offense by a different sovereign—because the separate-sovereigns exception has categorically removed that circumstance from the purview of the Double Jeopardy Clause. But there is no principled reason why, if the separate-sovereigns exception is eliminated, the *Blockburger* test would not apply across sovereigns in determining whether the offense a second sovereign seeks to prosecute is the "same offense" as the offense in the earlier prosecution.

As a result, abolishing the artificial separate-sovereigns exception—found nowhere in the plain text of the Fifth Amendment—will not categorically spell the end of a second-in-time sovereign's ability to vindicate its distinct sovereign interests. Rather, the second-in-time sovereign will be able to pursue its prosecution so long as it is not prosecuting the "same offense," *i.e.*, if the two offenses differ under *Blockburger*'s "same-elements" test. For example, if a human trafficker brings individuals into the country under false circumstances, *Blockburger* allows the federal government to prosecute visa fraud while state authorities prosecute sex trafficking offenses. *See, e.g.*, *Halim*, 223 Cal. Rptr. 3d at 499-501 (holding that federal visa fraud and state sex trafficking are different offenses under *Blockburger*). Similarly, in the case of health care fraud, a state may be able to prosecute state criminal health care fraud charges while federal prosecutors pursue charges of making a false statement to the United States. *Cf., e.g.*, *United States v. Gonzales*, 834 F.3d 1206, 1219-20 (11th Cir. 2016) (holding that federal conspiracy to commit

health care fraud, 18 U.S.C. §§1347, 1349, and conspiracy to defraud the United States, 18 U.S.C. §371, are different offenses under *Blockburger*). And someone transferring obscene materials to a minor to induce them into a sexual act could face federal charges for the transfer of materials and state charges for the enticement. *Cf., e.g., United States v. Taylor*, 777 F.3d 434, 438-40 (7th Cir. 2015) (holding that federal prohibition on transfer of obscene materials to a minor, 18 U.S.C. §1470, and federal prohibition on enticement, 18 U.S.C. §2422(b), are different offenses under *Blockburger*). In short, each sovereign will continue to be able to prosecute different crimes in a manner that protects its respective sovereign interests.

Although applying *Blockburger* across sovereigns will still allow subsequent prosecutions when the sovereigns pursue distinct crimes, *Blockburger* and the separate-sovereigns doctrine are not co-extensive. When the federal government criminalizes conduct not to address some distinct federal interest but to be seen as "doing something" to address a perceived problem that has long been the province of state law enforcement, *Blockburger* will not save a subsequent duplicative prosecution that merely rehashes what a prior prosecution has already litigated. But that is a feature, not a bug. Eliminating the separate-sovereigns doctrine and refocusing attention on *Blockburger* will have the salutary benefit of incentivizing sovereigns to avoid duplicative criminal prosecutions and to draft criminal laws that faithfully reflect their distinct sovereign interests, if any. Because the *Blockburger* inquiry looks to the statutory elements of each offense, reliance on *Blockburger* will

require a second-in-time prosecutor to find a criminal offense that criminalizes conduct unique to that sovereign. A sovereign's legislature will know that if it simply rehashes the same elements of another sovereign's criminal offense, or merely repeats those elements while adding a single new element, the Double Jeopardy Clause will appropriately prohibit successive prosecutions. *Cf. Brown*, 432 U.S. at 167 (greater-included offense is "the 'same' for purposes of double jeopardy" as lesser-included offense). That, in turn, will incentivize the legislature to refocus on whether there is really a need for criminalization at that level of government.

Accordingly, eliminating the separate-sovereigns exception and permitting *Blockburger* to apply across sovereigns will likely result in fewer, but clearer, more finely tuned criminal laws, benefiting all parties to the criminal justice system—prosecutors, defendants, defense counsel, and courts. It will have an especially constructive impact at the federal level, in light of the almost universally recognized trend toward "overcriminalization" in federal law. *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting); *see also, e.g.*, Julie Rose O'Sullivan, *The Federal Criminal Leviathan*, 37 Harv. J.L. & Pub. Pol'y 57, 57 (2014) (noting that there are at least "4,000 criminal statutes, but no one actually knows how many criminal prohibitions exist, in part because Congress regularly delegates to federal agencies the authority to promulgate regulations implementing legislation"); Hon. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 Am. J. Trial Advoc. 571, 575 (1994) (urging Congress to reconsider continuing to "sweep[] many newly created crimes,

such as those involving juveniles and handgun murders, into a federal court system which is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity"); Pet'r Br. 42-46. Applying the more focused *Blockburger* inquiry, rather than the free pass of the separate-sovereigns exception, would give Congress an incentive to refocus on whether there is a distinctly federal interest justifying proposed criminal laws, and to avoid scoring political points by simply enacting federal laws that rehash state-level offenses, lard up the U.S. Code, and needlessly divert the resources of the federal criminal justice system.

Finally, eliminating the separate-sovereigns exception makes practical sense given the healthy cooperation between state and federal law enforcement. The federal and state governments have long worked "in cooperation" with each other to address and prosecute crimes in a single jurisdiction. *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959). For example, "[t]o promote cooperation and information-sharing," state and federal officials frequently established task forces whose participants include assistant U.S. Attorneys, state deputy district attorneys, federal agents, and local police department investigators. *United States v. Zone*, 403 F.3d 1101, 1103 (9th Cir. 2005) (per curiam). In cases where federal and state sovereigns both claim jurisdiction, that task force may help "make a strategic decision where to prosecute it." *See id.* Federal and state authorities may also practice "cross-designation," which is "the practice of swearing in a state law enforcement officer as a special deputy United States marshal to assist in joint state/federal task forces," or

"administering a similar oath to federal officers assisting in state prosecutions." *United States v. Lucas*, 841 F.3d 796, 801 n.4 (9th Cir. 2016); *see also, e.g.*, *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (discussing "the cross-designation of a state district attorney as a federal official to assist or even to conduct a federal prosecution"). In still other cases, authorities from one sovereign may share entire files with authorities from another sovereign, and they may even sit alongside each other "at the prosecution table" during trial in a single jurisdiction. *United States v. Figueroa-Soto*, 938 F.2d 1015, 1017 (9th Cir. 1991).

This federal-state cooperation demonstrates that when the "same offense" is prohibited by both state and federal law, coordination between jurisdictions can ensure that the offense is prosecuted once and for all in the proper jurisdiction. Similarly, when one or the other jurisdiction prohibits a different offense under *Blockburger*, state and federal prosecutors will have strong incentives to cooperate and coordinate in ways that reflect the distinct sovereign interests of our national and state governments. Accordingly, the separate-sovereigns exception is largely unnecessary—separate sovereigns can and do cooperate to prosecute a single sovereign's crime—and its elimination will hardly upend the administration of criminal justice. Rather, eliminating the exception will force lawmakers to refocus on each sovereign's distinct interests and promote further federal-state cooperation, which "undoubtedly fosters effective enforcement of the criminal law" and "is surely to be encouraged." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

II. Eliminating The Separate-Sovereigns Exception Will Facilitate Plea Bargaining.

Abrogating the separate-sovereigns exception will facilitate the resolution of cases through guilty pleas, rather than full-blown and resource-intensive trials. This Court has recognized that plea bargaining "is an essential component of the administration of justice" that "is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The potential benefits from efficient plea bargaining are legion: It "leads to prompt and largely final disposition of most criminal cases," "avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial," "protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release," and, "by shortening the time between charge and disposition, ... enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Id.* at 261 (citing *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). And from a practical perspective, efficient plea bargaining is not only desirable but necessary: "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* at 260. Yet the separate-sovereigns exception currently disincentivizes guilty pleas.[4]

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[4] None of this is to suggest that excessive reliance on plea bargaining does not have its costs. There are many situations in which the plea bargaining dynamic gives prosecutors undue leverage and even the innocent have little practical alternative but to accept a plea. *See generally* Oren Bar-Gill & Omri Ben-

For criminal offenses that could give rise to culpability under both federal and state law, the current separate-sovereigns exception places defense counsel in an untenable position during plea bargaining. If a defendant pleads guilty in one proceeding, that defendant's admission of guilt may later be used against him in a second-in-time proceeding by a different sovereign for the same offense. Courts have "uniformly found that evidence of a defendant's valid prior state-court guilty plea for similar or lesser included conduct is properly admissible in a subsequent federal prosecution, even where admission of the plea could be considered virtually 'tantamount to directing a verdict.'" *United States v. Frederick*, 702 F. Supp. 2d 32, 37 (E.D.N.Y. 2009); *see also id.* (collecting cases and holding that where "there is no allegation of any constitutional defect with the state court plea, there are no grounds for excluding a prior state court plea" in a subsequent federal court prosecution); *see also* Fed. R. Evid. 801(d)(2) (providing that opposing party's statement is not hearsay).

Defense counsel thus may be understandably reluctant to recommend that their clients plead guilty to an offense in one proceeding if that guilty plea may then be used against a client in a subsequent prosecution. For obvious reasons, defense counsel will

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Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. Legal Analysis 737 (2009). But whatever other measures are appropriate to make plea bargaining fairer and more efficient, it makes little sense to have a judge-made doctrine like the separate-sovereigns doctrine serve as an impediment to efficient plea bargaining in a whole class of cases.

not want to encourage their clients to plead guilty if doing so will hand a second-in-time prosecutor near-conclusive evidence (*i.e.*, a virtually insurmountable admission of guilt for the same offense in open court) for use in a subsequent prosecution.[5]

To be sure, first-in-time defense counsel can try to negotiate an agreement with a potential second-in-time prosecutor precluding the prosecutor from using the defendant's guilty plea or accompanying allocution in any subsequent trial. But that is not always—or even frequently—possible. If no charges have yet been filed in the potential second jurisdiction, there may be no prosecutor with whom defense counsel can negotiate. This problem is particularly pervasive in cases where there are multiple potential venues for a subsequent prosecution. Furthermore, even if first-in-time defense counsel is able to identify and contact the potential second-in-time prosecutor, defense counsel may not be licensed to practice in that second jurisdiction, and may thus be unable to negotiate or enter into a binding agreement with the prosecutor. And, of course, the second-in-time prosecutor may simply not agree to foreclose introduction of a prior guilty plea at a subsequent trial, especially when the subsequent investigation is in its nascent stages. *See*

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[5] The plea bargaining dynamic underscores the superiority of the *Blockburger* framework over the separate-sovereigns exception. When the elements of the federal and state offenses are materially different, the plea to the first offense still leaves prosecutors in the second jurisdiction with distinct elements to prove. But since the separate-sovereigns exception allows a second prosecution even when the elements are identical, it creates a dynamic where the plea to the first offense leaves the defendant with no defense to the follow-on prosecution.

United States v. Long, 852 F.2d 975, 979 (7th Cir. 1988).

Pleas of *nolo contendere* (or "no contest"), rather than guilty pleas, may provide some protection in second-in-time proceedings. *See* Fed. R. Evid. 803(22). But some states do not authorize such pleas,[6] and they may be strongly disfavored in practice even when technically permitted. *See, e.g.*, *United States v. Dorman*, 496 F.2d 438 (4th Cir. 1974) (upholding district court's refusal to accept defendant's *nolo contendere* plea based on judge's "general rule" not to consent to such pleas). In all events, while in a subset of cases there may be creative ways of surmounting the difficulties that the separate-sovereigns exception presents for defense counsel advising a client on a guilty plea, there are other cases where the obstacles are insurmountable, and there is no valid reason for inflicting the costs of creative workarounds in the others. Eliminating the separate-sovereigns exception would remove all these obstacles and facilitate efficient plea bargaining in the many cases where the criminal offenses of multiple jurisdictions are potentially applicable.

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[6] *See, e.g.*, *State v. Salisbury*, 147 P.3d 108, 112 (Idaho Ct. App. 2006) ("[T]here is no ... Idaho statute or rule that provides for *nolo contendere* pleas."); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 291 (Iowa 1982) (noting that "we do not have the plea of *nolo contendere*"); *People v. Daiboch*, 191 N.E. 859, 860 (N.Y. 1934) ("The plea of 'non vult' or 'nolo contendere' is an ancient plea in criminal cases still in use in some of the states but abolished here."); *Kibler v. State*, 227 S.E.2d 199, 201 (S.C. 1976) ("[T]he proper procedure for our lower courts to follow is to refrain from accepting pleas of Nolo contendere in felony cases until such are authorized by our legislature.").

III. Upon Elimination Of The Separate-Sovereigns Exception, The Double Jeopardy Clause Should Apply To Both The Federal Government And The States.

As reflected in the arguments set forth above, the elimination of the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government (as in this case) or a state government. No matter which sovereign comes second, the Double Jeopardy Clause bars prosecution of the "same offence" prosecuted in the first proceeding.[7] That much plainly follows from incorporation doctrine. Insofar as the evolution of incorporation doctrine is one of the reasons for reconsideration of the separate-sovereigns exception in the first place, *see* Pet'r Br. 35-42, it would be particularly bizarre not to apply the Double Jeopardy Clause (stripped of the judicially created separate-sovereigns exception) only in federal court. Thus, whether the first prosecution was state or federal and whether the follow-on prosecution is state or federal, the second-in-time prosecutors should not be able to pursue charges for the "same offence."

The underlying purpose of the Double Jeopardy Clause reinforces this conclusion. Just as "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown*, 432 U.S.

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[7] As this Court has made clear, moreover, the Clause bars a second prosecution for the same offense whether the first prosecution resulted in an acquittal or a conviction. *Brown*, 432 U.S. at 165.

at 169, the Clause cannot be evaded by mere strategic timing and location of first-in-time prosecutions. Irrespective of the initial forum, the Double Jeopardy Clause is intended to "shield individuals from the harassment of multiple prosecutions for the same misconduct." *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Unless the Double Jeopardy Clause is to be treated as a pleading obstacle, rather than a fundamental guarantee of liberty, the protections afforded by the Clause must apply whether the second-in-time prosecution is brought by the federal government or by a state.

The fundamental unfairness of duplicative prosecutions prohibited by the Double Jeopardy Clause does not depend on the order of the prosecutions. At bottom, the Double Jeopardy Clause is motivated by a concern for the *individual*. The individual's interest in securing finality as to an accusation of criminal conduct is plainly just as apparent in state-first and federal-first prosecutions:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). It is an equal "affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).[8]

To provide that much-needed finality, irrespective of whether the federal or state prosecution proceeds first, "a final judgment in a criminal case, just as a final judgment in a civil case, should preclude renewal of the fray anyplace in the Nation." *Sánchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (citations omitted). Finality in the criminal context is, after all, even more important than finality in the civil realm. *See United States v. Oppenheimer*, 242 U.S. 85, 87-88

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[8] *Accord, e.g.*, *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852) (McClean, J., dissenting) ("[T]he criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view ... no government, regulated by laws, punishes twice criminally the same act."); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 9 (1992) ("The cases that articulate and apply the dual sovereignty doctrine misrepresent a basic, structural features of American government. Their [erroneous] lesson, put simply, is that polities, not people, possess sovereign power in this country."); *id.* at 26 ("The people of the United States constitute the only sovereign power recognized under the nation's law."); *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 347 (1821) ("The people of the United States are the sole sovereign authority of this country."). *See also, e.g.*, J.L. Brierly, The Law of Nations 150 (5th ed. 1955) ("sovereignty" is a "much-abused word").

(1916) (noting that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt"). And conditioning finality on a prior state-court prosecution has serious implications for criminal practice—for example, it frustrates state courts' abilities require the defense to opt into reciprocal discovery. *See* Fed. R. Crim. P. 16(b) (imposing parallel discovery on the defense when the defense requests discovery from the prosecution). Given the large-scale information sharing between authorities, a defendant might be deprived of the ability to forgo revealing a defense before a potential trial in the second-in-time forum.

There is no practical need to make the Double Jeopardy Clause a one-way ratchet, since all of the benefits of federal and state cooperation run both ways. As Judge Calabresi has explained, the considerable frequency of federal-state prosecutorial cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

This Court has embraced Justice Kennedy's observation that the "genius" of the Framers was to recognize that subjecting the People to two sovereigns, rather than one, would enhance liberty. *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). The Framers' insight was genius precisely because it runs counter to the

intuition that doubling the number of sovereigns would double the sources of tyranny. The vast bulk of this Court's jurisprudence is faithful to and indeed facilitates the Framers' vision. But the judge-made separate-sovereigns doctrine stands out like the proverbial sore thumb. Allowing a second sovereign to pursue separate criminal charges out of a single incident without any regard to whether the two prosecutions involve the "same offence" is the very embodiment of the intuition that two sovereigns pose a greater threat to liberty than just one. The Court should take this opportunity to vindicate the Framers' liberty-enhancing vision and discard a doctrine that licenses two sovereigns to put an individual's liberty in jeopardy twice for the same offense.

CONCLUSION

For the foregoing reasons, this Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause and reverse the judgment of the Eleventh Circuit.

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No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATOR ORRIN HATCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the senior United States Senator from Utah and the former chairman of the United States Senate Committee on the Judiciary. *Amicus*'s duties require a keen interest in issues of both federal criminal law and federalism, including the impact of the federalization of criminal law on both law enforcement and our constitutional structure. *Amicus* submits this brief in order to provide this Court with an experienced legislator's perspective on the constitutional and practical issues at play as the Court considers whether to overrule the dual sovereignty doctrine in the double-jeopardy context.

SUMMARY OF ARGUMENT

1. This Court has previously upheld the dual sovereignty doctrine, which allows consecutive prosecutions for the same crime by a state and the federal government without violating the Fifth Amendment's Double Jeopardy Clause or the Fourteenth Amendment's Due Process Clause, as an incident of our federalist system. Historically, this accurately reflected the separate spheres of interest protected by each sovereign's body of criminal law, ensuring that the prerogatives of each sovereign were protected from undue or unintentional interference by

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amicus* signing this brief or his counsel made a monetary contribution to the preparation or submission of this brief.

the other. In the decades since this Court last considered the dual sovereignty doctrine, however, the federalist balance of interests in criminal law enforcement has been upset by the federalization of a wide swath of crime previously dedicated to state enforcement. In the process, the practical protection against double prosecution embedded in our federalist system – that the states and federal government generally regulated separate spheres of criminal conduct, with relatively minor overlap – has fallen away along with the federalist balance of responsibilities that this Court previously described.

The rapid federalization of traditionally state-created and state-enforced areas of criminal law is reflected in both the scope and substance of the modern federal criminal code. There is now the potential for the exact harms the Double Jeopardy Clause was designed to prevent – retrial after acquittal and double punishment after conviction – for countless crimes that were traditionally the states' responsibility to define and punish. And neither sovereign's interests nor the federalist system is well-served as a result. This Court should overrule its prior decisions upholding the due sovereignty doctrine as no longer consistent with the interests of federalism nor the liberty protections of the Double Jeopardy Clause.

2. The dual sovereignty doctrine poses a particular hardship to lawmakers in their efforts to craft criminal punishments that reflect the interests they are attempting to protect. Punishing crime requires a balance of multiple factors, including deterrence, the need for incapacitation, the relative

seriousness of an offense, and governmental resources. However, if another sovereign can enforce cumulative punishments on any crime that a lawmaker defines, the interests of neither sovereign will be reflected in the ultimate criminal punishment. In other words, because of the broad federalization of criminal law, the dual sovereignty doctrine no longer protects separate sovereigns' interests as clearly as when this Court last considered the doctrine, and is far more likely than it previously was to undermine both sovereigns' interests.

ARGUMENT

When this Court last reaffirmed the "dual sovereignty" exception to the Fifth Amendment's guarantee against successive prosecutions for the same crime, it did so to preserve the balance of power in our federalist system. As a matter of both constitutional theory[2] and historical practice,[3] the states bore primary

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[2] *See, e.g.*, The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 96 (1964) (White, J. concurring), *overruled in part on other grounds by United States v. Balsys*, 524 U.S. 666 (1998) ("[T]he States still bear primary responsibility in this country for the administration of the criminal law.").

[3] *See, e.g.*, Daniel J. Freed & Marc Miller, *Sentencing in the States*, 6 Fed. Sent. R. 122, 122, 1993 WL 613745 (Vera Inst.

responsibility for defining and prosecuting general crime, with federal criminal law focused on relatively narrow and specific areas of federal interest.

But the balance between state and federal power to define and punish crime has shifted massively since the vitality of the dual sovereignty doctrine was last before this Court. The federalization of criminal law over the intervening decades has given federal prosecutors the ability to bring coordinate federal charges for a wide array of conduct – in many contexts vitiating the distinction between federal and state interests in criminal punishment. In this hyperfederalized context, the federalist underpinnings of this Court's prior dual-sovereignty decisions no longer reflect the reality of federal-state relations, and may well undermine, rather than support, an appropriate division of power. In any event, those federalist interests are no longer sufficiently served by the doctrine to warrant the harm to individual liberty suffered by criminal defendants charged with federal crimes for conduct that traditionally fell under the states' power to criminalize and prosecute. Instead, the dual sovereignty doctrine leaves neither the federal government nor the states certain of whether the criminal justice system is appropriately validating their particular interests.

This Court should reconsider the dual sovereignty doctrine in cases of successive prosecutions for the same crime by the federal government and a state, in

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Just.) (Nov. 1, 1993) ("[M]ost criminal prosecutions are handled by the states.").

light of the extensive federalization of the traditional criminal-law prerogatives of the states.[4] The pervasive federalization of criminal law to cover conduct that traditionally was prosecuted and punished by the states, and that falls within the states' core legislative interests, threatens to undermine the protections of the Double Jeopardy Clause unless the dual sovereignty doctrine is overruled in this context.

I. The Extensive Federalization of Criminal Law Has Undermined the Rationale for the Dual Sovereignty Doctrine.

When this Court last directly considered the dual sovereignty doctrine in 1959, it upheld the doctrine as a boon to "our federal system." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). Specifically, allowing the federal government and the states to initiate dual prosecutions for the same offense was understood as a check on "displace[ment] of the reserved power of the States over state offenses." *Id.*; *see also id.* at 155 (Black, J., dissenting). The Double Jeopardy Clause was not yet incorporated under the Fourteenth Amendment, and *Bartkus* was concerned primarily with the possibility that federal prosecution of a narrow federal interest might preclude state prosecution of a serious crime. This Court sought to avoid the "shocking and untoward deprivation of the historic right and obligation of the

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[4] *Amicus* takes no position on the appropriate test to determine whether a federal and state charge constitute the "same offence" under the Fifth Amendment. *See* U.S. Const. amend. V.

States to maintain peace and order within their confines" that might result if "federal prosecution of a comparatively minor offense" preceded and foreclosed "state prosecution of [a] grave ... infraction of state law." *Id.* at 137.

Bartkus and its companion case, *Abbate v. United States*, were accordingly built on the assumption that criminal law would be defined and enforced primarily by the states, with the federal government playing a only a smaller role in legislating and prosecuting crimes touching on particular federal interests. *See Abbate v. United States*, 359 U.S. 187, 195 (1959) ("[T]he States under our federal system have the principal responsibility for defining and prosecuting crimes."). This assumption was reasonable at the time, when federal criminal law was largely circumscribed to areas of particular federal interest, and the states were left to regulate and prosecute general crimes.

But what was true about the federalist nature of our criminal system in 1959 is no longer true today. In the decades since *Bartkus* and *Abbate*, Congress has federalized[5] criminal law at a staggering rate, and a substantial swath of substantive "state" crime is "federal" crime as well. Indeed, "[w]ith legislation

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[5] As used in this brief, "federalization" refers specifically to enactment of federal legislation defining and punishing crimes that were already regulated by the states without preempting states' ability to prosecute the same conduct. Federalization thereby alters the allocation of responsibilities between the federal and state governments.

covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas." John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1125 (1995).

This sweeping federalization of criminal law has undermined the federalism benefits of the dual sovereignty doctrine as described in *Bartkus* and *Abbate*. Unrestrained by the need to balance its own interests against the states', Congress has felt free to expand federal criminal law well beyond the scope envisioned at the founding and even through the mid-twentieth century, and the states have been powerless to resist. The diminished federalism interests served by the dual sovereignty doctrine in the era of federalization no longer justify the substantial threat to individual liberty posed by the potential for routine dual prosecutions for historically state-regulated crimes.

To restore the individual liberty protections of the Double Jeopardy Clause and ensure proper allocation of responsibilities in the federalist system, this Court should overrule *Bartkus* and *Abbate* insofar as they permit separate prosecutions for the same offense by a state and the federal government.

A. The Historical Division Between State and Federal Crime Has Almost Entirely Eroded Over the Past Sixty Years.

This Court first enunciated the dual sovereignty doctrine in *Fox v. Ohio*, 46 U.S. 410 (1847). In *Fox*, this Court held that the states had concurrent jurisdiction over areas of criminal enforcement explicitly within federal jurisdiction, such as offenses against "the current coin of the United States," and are not preempted from prosecuting such crimes. *Id.* at 434-35. This Court also discussed the potential double jeopardy implications of such a rule, and concluded that the possibility of double punishment by dual sovereigns did not require preemption. *Id.* Reflecting the balance between the federal and state roles in criminal law enforcement of the era, this Court believed that dual prosecutions for the same conduct, if constitutionally permissible, would be exceedingly rare. *See id.* at 435 ("It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."). Such a belief was well-founded in an era when the enactment and enforcement of general criminal laws was the province of the states – an arrangement that, though somewhat weakened, persisted and prevailed up to and through this Court's last consideration of the dual sovereignty doctrine in 1959.

The Constitution granted Congress specific power to regulate only four categories of crime: counterfeiting of federal money and securities, U.S. Const. art. I, § 8, cl. 6; "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id.* cl. 10; crimes committed in the District of Columbia and on other federal land, *id.* cl. 17; and treason, *id.* art. III, § 3, cl. 2; *see also* Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 456 n.10 (1994). Before the Civil War, "the federal government's role in defining and enforcing criminal law was limited to the areas of unique national concern listed among its constitutionally enumerated powers." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 4 (1992). *Fox* was thus decided against a backdrop of highly limited federal role in criminal law enforcement, and one that was largely limited to subject matter of specific interest to the federal government.

Even where the federal government regulated and punished general crimes around the time *Fox* was decided, the scope of such enforcement was limited to areas of particular federal concern, either geographically or by virtue of the subject protected. For instance, "[i]n 1790, Congress made it a crime to commit murder, manslaughter, mayhem, or larceny 'within any fort, arsenal, dock-yard, magazine, or in any other place . . . under the sole and exclusive jurisdiction of the United States,'" and in 1792 "Congress made it a crime to rob a carrier of, or to steal, the mail of the United States." George C. Thomas III, *Islands in the*

Stream of History: An Institutional Archeology of Dual Sovereignty, 1 Ohio St. J. Crim. L. 345, 348 (2003). While state law surely would have covered crimes such as murder and robbery, "as long as those acts took place on federal bases or were directed at mail carriers, the states might very well have been indifferent" to the federal government's enforcement of these laws. *Id.*

It was not until 1872 that Congress first enacted criminal legislation covering a general crime already regulated by the states, when it passed the original mail fraud statute, the predecessor to the current 18 U.S.C. § 1341. *See* Braun, *Praying to False Sovereigns* at 4 & n.14. That statute "was the first significant instance of federal legislation in an area traditionally within the states' jurisdiction." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1165 n.18 (1995).

It was not until Prohibition and the Great Depression, however, that federalization of criminal law would start to encompass a substantial amount of conduct already within the states' sphere of regulation. New federal laws "includ[ed], for the first time, crimes of violence against private individuals and businesses, as well as the first federal firearms legislation." Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825, 833 (2000). The Eighteenth Amendment granted Congress and the states concurrent power to enforce Prohibition, *see* U.S. Const. amend. XVIII, an invitation that Congress took up with passage of the National Prohibition Act (popularly known as the Volstead Act), Pub. L. No. 66-66, 41 Stat. 305 (1919). Enforcement of the Volstead

Act was at issue when this Court reaffirmed the dual sovereignty doctrine in *United States v. Lanza*, 260 U.S. 377 (1922). There, this Court held that the states and the federal government "[e]ach may, without interference by the other, enact laws to secure prohibition," and that prosecution under state prohibition provisions did not bar subsequent prosecution under the Volstead Act. *Lanza*, 260 U.S. at 382.

Despite the ratification of the Twenty-First Amendment in 1933, the repeal of Prohibition did not provide impetus to reverse the trend in the federalization of criminal laws designed to protect general welfare. Prohibition had given rise to "a thriving organized crime underworld and a massive federal law enforcement apparatus, [and] the federal government continued the federalization of criminal law directed at combatting organized crime even after the repeal of the Eighteenth Amendment." Michael A. Simons, *Prosecutorial Discretion & Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 904-05 (2000). Even so, the federal government's role in general criminal enforcement was limited compared to the states, even in this initial period of expansion. Federalization remained "modest[] ... through the middle part of the twentieth century." *Id.* at 905.

During the second half of the twentieth century,[6] however, the scope of federal criminal law exploded. *See* 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(d), at 75 n.297 (4th ed. 2015). In contrast to the narrow and explicit grants of authority to define and punish crime that underlay the antebellum federal criminal code, this rapid federalization of criminal law was accomplished largely through the use of Congress's power to regulate commerce, *see* U.S. Const. art. I, § 8, cl. 3, and used the approach that an "entire class of a given activity, be it manufacturing goods, loan sharking or drug dealing, by definition 'affects commerce'" and could therefore be the subject of federal criminal law. Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 Syracuse L. Rev. 1317, 1326 (2000). The rise of omnibus crime bills, which "can be hundreds of pages long and contain an infinite number of provisions defining new crimes," pushed federalization of the criminal law even further. *Id.* at 1327. Examples include "the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and

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[6] Exactly when the rapid expansion of federal criminal law began is somewhat contested. *See* 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(d), at 75 n.297 (4th ed. 2015). Regardless of whether the most explosive growth began in the 1960s, the 1980s, or somewhere in between, the massive federalization of criminal law could only be recognized as such after this Court's last direct consideration of the dual sovereignty doctrine in *Bartkus* and *Abbate*.

Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1145 (1995). As the criminal provisions of the federal code accumulated, any differentiation in the criminal law-enforcement role of the federal and state governments coordinately decreased.

The relative recency of the federalization of criminal law was captured in the report of an American Bar Association task force in 1998. The task force found that more than 40% of federal criminal provisions enacted since the Civil War – that is, the timeframe when the federal government began enacting general criminal statutes in realms traditionally governed by the states – had been enacted since 1970. Am. Bar Ass'n Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 7 (1998). This pace did not slow in the years that followed. Between 2000 and 2007, Congress enacted 452 new criminal laws, a rate of 57 new crimes per year. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Found. Legal Memo. at 1 (June 16, 2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf.

Because of this rapid expansion, "the bulk of federal criminal provisions now deal with conduct also subject to the states' general police powers." Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals*

and Mattress Tags to Overfederalization, 54 Am. U. L. Rev. 747, 754 (2005). And with respect to crimes historically policed by the states, "[d]ual federal-state criminal jurisdiction is now the rule rather than the exception." Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 997 (1995). In other words, the federal government has come to occupy much of the same role in criminal law enforcement as the states, eliding the historical distinction in the two sovereigns' interests in defining and prosecuting crime.

B. The Scope of Federal Criminal Law Has Become Practically Unknowable and Substantially Overlaps with State Criminal Law.

1. Federal criminal law has grown so substantially that accurately quantifying the number of federal criminal provisions is now all but impossible.

Efforts to count the number of federal criminal provisions have repeatedly been unsuccessful because of the stunning breadth of the federal criminal code. *See* Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, The Wall St. J. (July 23, 2011), https://on.wsj.com/2oKFAiM. The Justice Department made the first known effort to do so in the post-federalization era, and arrived at an estimate of 3,000 federal crimes created by statute. *Id.*

The American Bar Association made its own effort to count the number of federal criminal provisions in 1998. *See* American Bar Association Task Force on the Federalization of Criminal Law, *supra*. While it

ultimately did not succeed in arriving at an estimate of the size of the federal criminal code, it determined that the Justice department's decade-old conclusion of 3,000 was likely an underestimate of the number of federal criminal provisions. And this figure was exclusive of federal regulations that may be enforced criminally, which the ABA estimated to be approximately 10,000 by the end of 1996, and another estimate from 2008 placed at over 300,000. Baker, Jr., *Revisiting the Explosive Growth of Federal Criminal Law*, Heritage Found. Legal Memo. at 4.

By 2004, a new estimate placed the number of federal crimes at over 4,000.[7] John S. Baker, Jr., Federalist Soc'y for Law & Pub. Pol'y, *Measuring the Explosive Growth of Federal Crime Legislation*, 5 Engage 23, 23 (Oct. 1, 2004), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/BNvfVKmeVXx9uulnQbIvKotdpzytrAliLKLilhaX.pdf. An updated estimate by the same scholar in 2008 put the number of federal crimes created by statute at nearly 4500 – an increase of 1500 crimes in approximately 20 years, and of nearly 500 in just the last eight years of that period. Baker, *Revisiting the Explosive Growth of Federal Criminal Law*, at 1.

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[7] "Crimes," in this study, includes all provisions in the U.S. Code carrying a criminal penalty, regardless of whether they require a *mens rea* and therefore meet the common-law definition of "crime." Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, at 30.

2. The newly massive scope of federal criminal law is reflected in the federal courts' dockets. In 2003, Judge Guido Calabresi of the Second Circuit Court of Appeals estimated that appeals of convictions for federal crimes that also could have been prosecuted under state statutes accounted for thirty to fifty percent of the Second Circuit's overall appellate docket. *See* Guido Calabresi, *Federal and State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. Rev. 1293, 1297 (2003). This change, he said, was not salutary: "Apart from the dramatic change that such federalization effects in our federal system, making criminal law national rather than local causes great problems for the lower federal courts." *Id.* Other judges have echoed this concern. *See United States v. Wall*, 92 F.3d 1444, 1480 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) (stating "federal courts have been deluged with cases of late" in part because of "the federalization of state crimes by Congress," and stating that restraint in federalization would promote "not only state sovereignty . . . but the quality of justice in the federal courts."); *United States v. Crawford*, 982 F.2d 199, 206 (6th Cir. 1993) (Merritt, C.J., concurring) (citations omitted) ("Under the system of federalism devised by our founders and maintained until recently, federal prosecutors have not sought to displace the state systems of criminal justice in routine cases. This is no longer the case as routine street crime cases like this firearms case are brought in federal court in order to insure longer sentences under the sentencing guidelines and mandatory minimum sentencing laws . . . ."); *United States v. Hickman*, 179 F.3d 230, 242 (5th Cir. 1999) (en banc) (Higginbotham,

J., dissenting) ("With the increased federalization of traditional state crimes, the consequence of this acquiescence of the judiciary looms large. Not surprisingly, the increased overlapping of traditional state criminal statutes taxes the institution of Article III courts.").[8]

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[8] *See also United States v. Rutherford*, 236 F. App'x 835, 845 (3d Cir. 2007) (Ambro, J., concurring) ("By prosecuting Rutherford at the federal level, the Federal Government has effectively incapacitated a career criminal for the remainder of his adult life. To do so, however, it has overridden the default state criminal system in what looks like a classic state-law crime."); *United States v. Rrapi*, 175 F.3d 742, 756 (9th Cir. 1999) (Thomas, J., dissenting) (criticizing extension of federal bank robbery act to include off-premises ATMs as "an unwarranted and unnecessary judicial federalization of burglary – a crime well within the expertise of local law enforcement and the state courts."); *United States v. Snyder*, 136 F.3d 65, 70 (1st Cir. 1998) ("The continuing federalization of criminal law increases the frequency with which federal/state sentencing disparities occur."); *cf. United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (in light of federalization of criminal law, "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome."); *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[T]he recent expansion of federal criminal law jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well."); *United States v. Claiborne*, 92 F. Supp. 2d 503, 509 (E.D. Va. 2000), *aff'd*, 3 F. App'x 166 (4th Cir.

The federalization of criminal law is reflected in the number of criminal prosecutions pending in federal courts. In 1959, when *Bartkus* and *Abbate* were decided, there were 7,727 pending criminal cases in the federal courts at year-end. *See* Federal Judicial Center, Caseloads: Criminal Cases, 1870-2017, https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2017 (last accessed Sept. 10, 2018). Leaving aside outlier numbers of prosecutions in the Prohibition era (1920-1933),[9] the number of pending federal prosecutions at year's end continued to hover at or below 10,000 until the mid-1960s, when it began to rise steadily, reaching as many as 81,079 pending prosecutions at year's end 2010. *Id.* The number of pending federal prosecutions was 73,874 at the end of 2017 – a nearly tenfold increase from 1959. *Id.*

3. Nor does the federal criminal code in its modern iteration reflect a considered judgment about the circumstances and interests that should underlie a

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2001) ("Where the Commerce Clause has been broadly expanded and the line between federal and state crimes has been blurred to allow virtually every crime to be prosecuted in federal court under the auspice of 'affecting interstate commerce,' the rationale of the dual sovereignty doctrine is nullified and thus, the doctrine should be eliminated.")

[9] Between 1933 and 1934, the number of pending federal prosecutions dropped from 20,903 to 9,478. *See* Federal Judicial Center, Caseloads: Criminal Cases, 1870-2017, https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2017 (last accessed Sept. 10, 2018). The Twenty-First Amendment was ratified on December 5, 1933.

federal intrusion into traditional areas of state interest. Instead, "[t]he most distinctive feature of federal criminal law is that it had evolved piecemeal, with overlapping and often inconsistent statutes passed at different times in response to different national concerns." Jeffries, Jr. & Gleeson, *The Federalization of Organized Crime*, 46 Hastings L.J. at 1125.

The upshot of this scattershot and extensive federalization is that "many federal statutes duplicate state laws by prohibiting the same or similar conduct and enabling federal prosecutors to bring charges to protect interests no different than those that state laws address." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 654–55 (1997). The types of general crime now subject to federal as well as traditional state control include "drug trafficking, firearms offenses, certain forms of theft and embezzlement, arson, fraud committed by mail or telephone, bank fraud, robbery and extortion, fraudulent use of credit cards, and auto theft . . . ." *Id.*; *see also* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997) (listing as federalized state crimes "virtually all drug crimes, carjacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from an insurance company, and murder of a state official assisting a federal law enforcement agent."); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 512 n.9 (1994).

To be sure, "some duplicative federal crimes require proof of elements not present in the definition of state crimes, such as a connection to interstate commerce or use of the mail." Clymer, *Unequal Justice*, 70 S. Cal. L. Rev. at 655. But "these elements do not ensure that prosecutions are limited to cases involving unique or significant federal interests." *Id.* As long as these often minimal requirements to bring a state crime within federal jurisdiction are met, whether there is a federal "interest" is no limitation on the federal government's ability to prosecute quintessentially state-level crimes. There is no dispute that "federal prosecutors do employ duplicative federal statutes in cases that involve distinct federal interests, such as prosecutions of national and international fraud and drug conspiracies, but they also can (and often do) use them when no such federal interests are at stake." *Id.* at 655.

4. The federal offenses that overlap with state crimes, and criminalize conduct traditionally regulated by the states, are far too numerous to list. Nevertheless, the following examples illustrate the extent of federal occupation of the traditional state role. These are not all necessarily examples of the most common prosecutions for federal crimes, but rather demonstrate the nature of federalization.

Drug crimes. The overlap in federal and state criminal drug laws is well-documented. *See, e.g.*, Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. at 834, 839. The judiciary has long recognized the problems for both case administration and the balance of federal-state authority that mass

federalization of drug laws can cause. *See* Fed. Courts Study Comm., Judicial Conf. of the U.S., *Report of the Federal Courts Study Committee*, at 6 (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf (describing "deterioration in the indices of federal judicial performance" brought on by surge in trials from the "expanded federal effort to reduce drug trafficking"); *id.* at 15-16 (recommending demarcation between state and federal responsibilities in prosecuting drug trafficking in order to "conform to the principles of federalism."); *id.* at 35-36 (recommending federal prosecutors limit drug charges to those that "cannot or should not be prosecuted in the state courts," and noting that drug filings have fueled increase in federal criminal cases). While the largest trafficking cases may benefit from federal expertise, many low-level cases wind up the subject of federal prosecutions as well. *See* 1 LaFave et al., *Criminal Procedure* § 1.2(d), at 84 n.333 (quoting study stating that "some 36 percent of all sentenced drug offenders in the federal system could be classified as 'low-level drug law offenders'").

Gun crimes. Federal gun prosecutions similarly have risen precipitously since the early 1990s. The number of federal gun possession prosecutions doubled between 1991 and 2001, and nearly tripled between 1991 and 2006. David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 Cardozo L. Rev. 1427, 1441 (2011). In 1997, the city of Richmond, Virginia announced a policy known as "Project Exile," which mandated that all criminal firearm offenses would be prosecuted federally if a federal statute applied. *See* Daniel C. Richman,

"Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 379 (2001). This decision was made not because federal authorities had a particular interest in Richmond-based gun crimes, but specifically to obtain certain aspects of federal criminal law – such as pre-trial detention and longer sentences – in order to advance local interests. *Id.* at 379-80; *see also* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1311 n.163 (2005).

Carjacking. Under 18 U.S.C. § 2119, any person who takes from another person, by force and violence or by intimidation, a car that has been shipped or received in interstate or foreign commerce, with the intent to cause death or serious bodily harm, is guilty of a felony and subject to a fine and up to 15 years' imprisonment if no injury occurs, 25 years' if serious bodily injury occurs, and capital punishment if death occurs. *See* 18 U.S.C. § 2119. Such conduct is already covered under the criminal law of every state, as robbery and otherwise. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 708 & n.29 (2005); *see also* Mary C. Michenfelder, Note, *The Federal Carjacking Statute: To Be or Not to Be? An Analysis of the Propriety of 18 U.S.C. § 2119*, 39 St. Louis U. L.J. 1009, 1012 (1995) (arguing that "[c]arjacking is predominantly a state crime and states have proven successful in its prosecution and punishment," and that "[a]n examination of the crime of carjacking and its impact upon federal courts reveals no clear need for federal presence to combat this state crime.").

Hate crimes. Often passed in circumstances that rightly inspire outrage, hate crimes legislation also federalizes conduct that already is criminal under state law. For example, the Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. § 247, provides punishment for conduct such as kidnapping, sexual abuse, homicide, arson, and battery, each of which does not require a federal statute to be criminally prosecuted. *See* 18 U.S.C. § 247; *see also* 18 U.S.C. § 249 (punishing homicide, kidnapping, assault, or battery against a victim chosen on the basis of race, color, religion, national origin, gender, sexual orientation, gender identity, or disability). Despite the additional intent and interstate commerce elements of such statutes, the core conduct required for prosecution is an underlying crime traditionally falling within state prosecutorial powers. *Cf.* Scott Wallace, *Creative Coalitions: New Brakes on Congress's Drive to Federalize Crime*, 11 Fed. Sent'g Rep. 3, 1998 WL 1113332 (Vera Inst. Just.) (Dec. 1, 1998) (arguing insufficient consideration taken of state criminal laws during debate over proposed hate-crime bill in 1998). The potential for double punishment of such conduct implicates successive prosecution concerns, and calls into question the dual sovereignty doctrine. *See, e.g.*, Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 Stan. L. & Pol'y Rev. 251, 277 (2008) (noting, in discussion of the Hate Crimes Prevention Act of 2007, that "it is not easy to defend a doctrine that allows a defendant to be tried twice for what is in reality the same crime."); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics,*

Expressive Law, or Tool for Criminal Enforcement?, 80 B.U. L. Rev. 1227, 1275 (2000) (arguing that "cooperative federalism" model of criminal enforcement calls into question the dual sovereignty doctrine).

Murder-for-hire. The federal murder-for-hire statute, 18 U.S.C. § 1958(a), provides that "[w]hoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed *in violation of the laws of any State or the United States* as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so," may be punished with a series of escalating penalties up to the death penalty, depending on whether death resulted. 18 U.S.C. § 1958(a) (emphasis added). This statute explicitly piggybacks the ability to bring a federal prosecution on state laws already outlawing the same conduct, with an "interstate commerce" requirement appended to bring the statute within Congress's constitutional powers.

Because of the dual sovereignty doctrine, § 1958 provides a mechanism to obtain duplicative or inconsistent outcomes on a murder-for-hire charge, depending on the circumstances. The latter occurred in 2002, when a Texas man was convicted under § 1958 after he had been acquitted by a Texas jury for the same murder-for-hire plot. *See* David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 Wash. U. L.Q. 765, 768-69 (2003). The federal investigators assigned to the case were even able to "interview[] members of the

jury that acquitted [the defendant], questioning them as to what evidence and aspects of Texas's case led them to return the not-guilty verdict." *Id.* at 769.

C. The Expanding Scope of Federal Criminal Law Has Vitiated Federalism Protections Formerly Inherent In the Dual Sovereignty Doctrine.

The principal federalism benefit of the dual sovereignty doctrine is, in theory, to prevent a state or the federal government from preventing vindication of the others' unique interest in a prosecution by rushing to the courthouse or otherwise obtaining a less serious punishment than the other would consider sufficient. Historically, the Court's concern was for the "undesirable consequences" that might result if a state's criminal case prevented federal prosecution of activity that "impinge[s] more seriously on a federal interest than on a state interest," *Abbate*, 359 U.S. at 195, or a federal prosecution prevented vindication of a primarily state interest, *see Bartkus*, 359 U.S. at 137. In other words, this Court described the power of each "sovereign" to prosecute as an incident of our federalist system, bolstering the proper allocation of power between the federal government and the states.[10]

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[10] To be sure, this Court stated in *Heath v. Alabama* that "it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Government in our federalist system, that constitutes the basis for the dual sovereignty doctrine." 474 U.S. 82, 90–91 (1985) (holding successive prosecutions by separate states

This rationale may have been required before incorporation of the Fourteenth Amendment. And it may have been sensible when the federal government and the states largely prosecuted conduct within separate spheres, when any overlap in conduct covered by criminal prohibitions was likely incidental to the separate interests captured by the federal and state criminal prohibitions at issue. Indeed, "[t]he dual sovereignty doctrine was introduced and developed during eras of federalist sentiment characterized by strident assertions of state sovereignty." Dominic T. Holzhaus, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 Colum. L. Rev. 1697, 1705 (1986). As this Court's rationale in *Bartkus* and *Abbate* demonstrated, the doctrine addressed the concern that prosecution under a narrow area of federal interest would not fully vindicate the general police protection interests of the states, or that a general state prosecution would not take sufficient account of the narrow but important areas of federal interest. Even

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not barred by Double Jeopardy Clause). But while the states' and federal government's "independent sovereign authority" makes the dual sovereignty doctrine *possible*, it does not answer the question whether that independent sovereign authority requires the dual sovereignty doctrine between the federal government and the states, as a matter of constitutional interpretation of the Fifth Amendment. *Abbate* and *Bartkus* made quite clear that the dual sovereignty doctrine was justified, at least in the federal-state context, as a matter of the relationship between the sovereigns in our federalist system.

in the relatively rare instances where the same conduct was regulated by both federal and state authorities, the states and federal government could be understood to have sufficiently unique interests in enforcing their criminal prohibitions that, in those well-defined areas, the potential for dual prosecution did not substantially impair the individual liberty interests protected by the Double Jeopardy Clause. *See, e.g., Lanza*, 260 U.S. at 381 (stating that Eighteenth Amendment's grant of power to Congress and reservation of power to states to enforce Prohibition was adopted to preserve extant state power, in order to "put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits.")

Now, however, "the dual sovereignty doctrine presents an inaccurate factual description of the relationship between the state and federal governments in the area of criminal law." Braun, *Praying to False Sovereigns*, 20 Am. J. Crim. L. at 10. This Court did not and could not have anticipated the expansive federalization of criminal law. And as federal criminal law has expanded into most areas that were historically the province of state criminal law, the individual liberty interest protected by the Double Jeopardy Clause, *see* Pet'r Br. 29-30, has been overwhelmed by the nearly universal potential for dual prosecution and punishment of historically state-regulated criminal behavior. The upshot is that, for most state crimes, the Double Jeopardy Clause is currently almost no guarantee against successive prosecution, contrary to the Clause's intended role and the liberty interests of citizens charged with a crime.

Indeed, both the federal government and the states pay a high federalism price under the dual sovereignty doctrine. Although justified as a boon to federalism, the dual sovereignty doctrine in its current operation privileges federal interests – or federal prosecution in areas that are properly understood as primarily being of state interest – at the expense of the states. Because federal criminal law was initially quite circumscribed, the expansion of federal criminal law has come at the expense of states' traditionally exclusive criminal jurisdictions. And while states remain free to punish behavior falling within these areas of interest, their ability to instill fixed or proportionate penalties has eroded in light of the ability of federal prosecutors to tack on additional penalties to conduct already criminalized by the states. Indeed, each of the ostensibly separate sovereigns suffers from the possibility that a successive, and cumulative, prosecution by the other will override its judgment about the appropriate punishment. "In sum, because the federal government need not preempt or displace state laws in passing comparable federal criminal laws, states have no grounds on which to challenge the growing scope of the federal law enforcement establishment." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1180 (1995).

D. The Federalization of Crime Undermines the Practical Rationale for the Dual Sovereignty Doctrine.

Not only has federalization of criminal law undermined the federalism rationale for the dual sovereignty doctrine, but it has also exposed an increasing number of defendants to the very ills that the Double Jeopardy clause was designed to prevent: second attempts at unsuccessful prosecutions, and "multiple punishments for the same offense." *See Whalen v. United States*, 445 U.S. 684, 688 (1980) (quotation marks omitted); *Green v. United States*, 355 U.S. 184, 187 (1957). As the federalism benefits of the doctrine are eroded by the federal government's wholesale move into prosecution of general crimes based on the same interests as the states, the harm to individual defendants becomes all the more egregious as the possibility of dual prosecutions, once thought a rarity, becomes reality for more and more criminal defendants. Simply put, "[t]he federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions." Meese, III, *Big Brother on the Beat*, 1 Tex. Rev. L. & Pol. at 22.

With respect to the possibility of double punishment, "it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting); *see also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). And dual punishment can be particularly unfair for federal prosecution of traditionally state-regulated crimes, because federalization often "provides harsher

penalties than those available at the state level." Guerra, *The Myth of Dual Sovereignty*, 73 N.C. L. Rev. at 1167. For example, federal "law prescribes stiff mandatory minimum sentences and . . . maximum penalties for drug offenses. Under the Continuing Criminal Enterprise statute, a person convicted of any of the most serious drug felonies will receive a mandatory life sentence. The statute also authorizes the death penalty for an intentional killing committed in furtherance of a continuing criminal enterprise." *Id.* at 1167–68. With nearly every state crime now subject to potential double punishment because of mass federalization, these concerns have come to overwhelm whatever federalism benefit remains from the dual sovereignty doctrine.

An acquitted defendant's interest in not being subject to a second trial for the same conduct, meanwhile, is quintessential to the Double Jeopardy Clause's protections. As this Court has explained, "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) (citation omitted). Indeed, the very purpose of a successive prosecution may be to overcome an acquittal by a "separate" sovereign. *See, e.g., United States v. Angleton*, 221 F. Supp. 2d 696, 700 (S.D. Tex. 2002) (permitting federal prosecution after FBI agents interviewed jurors in unsuccessful state prosecution), *aff'd*, 314 F.3d 767 (5th Cir. 2002). With federal statutes available to retry essentially any acquitted state defendant, the dual sovereignty doctrine greatly

diminishes the guarantees of the Double Jeopardy Clause.

* * *

In light of the changed face of federal criminal law since the 1950s, the dual sovereignty doctrine no longer reflects sound federalist policy as it did when the dual sovereignty doctrine was last considered. Aligning the protections of the Double Jeopardy Clause with the practical reality of increasing federalization should encourage more judicious use of federal legislation and federal prosecutorial power when matters of primary importance to the states are at issue, and more accurately reflect the interest in federalism in the era of federalization of criminal law.

II. The Dual Sovereignty Doctrine Complicates Legislators' Task When Fixing Criminal Punishments.

This Court's dual sovereignty cases recognize the importance of sovereigns' ability to align their particular interests with the punishment they choose to impose for criminal conduct. Both *Bartkus* and *Abbate* describe the possibility that divergent federal and state interests may lead to vastly different punishments for similar conduct. *See Bartkus*, 359 U.S. at 137 ("It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States."); *Abbate*, 359 U.S. at 195 ("[A] disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest.").

However, when the federal government applies criminal sanctions to conduct already penalized by the states and that is historically the states' responsibility to regulate, the dual sovereignty doctrine upsets each sovereigns' ability to align criminal punishments with its particular interests. For instance, if a state decides particular conduct should be punishable by no more than 5 years' imprisonment, and the federal government decides that it should be punishable by no more than 7 years' imprisonment, because of the dual sovereignty doctrine, that conduct exposes an individual to 12 years' imprisonment – significantly more than either sovereign believed to be in its interest.

By the same token, the dual sovereignty doctrine frustrates legislators' efforts to craft appropriate criminal sanctions. Legislators already face uncertainty when only one sovereign is involved; regardless of the penalties the legislature prescribes, there is always a question about how aggressively the statute will be enforced. The dual sovereignty doctrine further complicates legislators' task. A legislator cannot be certain about how other sovereigns will address the same conduct under their laws, or the degree to which state and federal prosecutors will coordinate or defer to each when enforcing those laws. Thus both state and federal legislators are left with little ability to understand how severely particular conduct will be punished under the laws they write.

For example, a state legislator seeking to fully vindicate state interests, may find the state interest overwhelmed by federal legislation and prosecution

that would permit, through consecutive punishment, a far more substantial prison term than the state legislator would find appropriate. Conversely, a federal legislator who undershoots her preferred punishment to fully vindicate federal interests, based on the possibility that a cumulative state prosecution would, in tandem, satisfy without overshooting those interests, risks that a subsequent state prosecution never comes, thereby leaving the federal interest underprotected.

In this way, far from protecting the interest of each separate sovereign in our federalist system, the dual sovereignty doctrine can prevent either from being able to achieve their preferred ends. This concern is paramount to *amicus*, who is tasked with making these difficult judgments. It is critical that legislators be able to reasonably predict the effects of criminal legislation, and fostering such certainty is critical to a legislator's task of balancing individual liberty and governmental interests. The dual sovereignty doctrine, however, in conjunction with the massive federalization of criminal law, ensures that legislators will always be shooting at a moving target when attempting to fix appropriate criminal penalties.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court overrule its holdings in *Bartkus* and *Abbate* and put to rest the dual sovereignty exception to the Double Jeopardy Clause as applied to subsequent federal-state or state-federal prosecutions. The extensive federalization of criminal law has rendered ineffective the federalist underpinnings of the

dual sovereignty doctrine, and its persistence impairs full realization of the Double Jeopardy Clause's liberty protections.

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TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief of Amici Curiae Criminal Procedure Professors Stephen E. Henderson, George C. Thomas, III, Michael J. Z. Mannheimer, and Kiel Brennan-Marquez In Support of Petitioner

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INTEREST OF AMICI CURIAE

Amici curiae are professors of criminal law, constitutional criminal procedure, and related disciplines who have studied, taught, written about, and litigated cases involving the Double Jeopardy Clause. Amici believe this case presents fundamental issues of double jeopardy law that concern our constitutional structure.*

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* No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution to fund its preparation or submission. Counsel for all parties received timely notice of amici's intent to file this brief; all parties have consented to its filing.

The views expressed herein are those of the individual amici, not of any institution or group with which they are affiliated.

SUMMARY OF THE ARGUMENT

The Fifth Amendment guarantees that, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." Yet that is precisely what happened to Terance Martez Gamble. The State of Alabama prosecuted and convicted him for being a felon in possession of a firearm. Subsequently, the United States initiated a second prosecution for what all parties have assumed is definitionally the same offense, yielding a second conviction. That second, duplicative prosecution and conviction violated the letter and spirit of the Double Jeopardy Clause.

As a matter of the Framer's understanding, as a matter of this Court's theoretical justifications for double jeopardy, and as a matter of policy respecting multiple prosecutorial powers, the United States should not be considered a double jeopardy sovereign that is completely independent of its constituent States. This Court ought to restore the double jeopardy right to its proper constitutional position, holding that as between the United States and Alabama, there is not—and never should have been—a "dual sovereignty" exception to the double jeopardy bar when identical offenses are prosecuted.

* * *

There is evidence that the Double Jeopardy Clause's straightforward text was understood at the time of the framing to protect very broadly against second prosecutions, regardless of the identity of the sovereign. *See* Br. of Amici Curiae Law Professors in Supp. of Pet'r 1 ("At the Founding and for several decades thereafter, a prosecution by one sovereign was understood to bar a subsequent prosecution by all other sovereigns."); *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) ("[I]t has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction."). Although at first this might seem a surprising limit on prosecutorial power, upon reflection it is a most sound one. Without some reason to question the legitimacy of that first prosecution—and thereby to question the very legitimacy of the first sovereign—there is no utilitarian or retributive justification for bringing prosecutorial power to bear against the defendant a second time. A sovereign-agnostic conception of double jeopardy protection is therefore rooted in respect for coordinate jurisdictions and in notions of limited government power.

It was meant to be a simple case, then, when—as here—the alleged authority for the attempted second prosecution for an identical offense "derive[s] from the same 'ultimate source'" as that of the first. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). In creating our federal structure, "[t]he Framers split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)

(Kennedy, J., concurring), "divid[ing it] between the government of the Union, and those of the states," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Framers did not *clone* or *duplicate* sovereignty. Otherwise, the very core of our governing structure would be impossible, as an *independent* sovereign can never be *supreme* over another. *See* U.S. Const. art. VI. It is not surprising, then, that the Framers rejected proposed language that, most plausibly read, would have limited the Fifth Amendment double jeopardy bar to multiple federal prosecutions. *See* The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 467 (Neil H. Cogan ed., 2d ed. 2015) (chronicling the rejection of George Partridge's proposal to add the limiting phrase "by any law of the United States" after the current draft's "same offence"); *see also Abbate*, 359 U.S. at 203-04 (Black, J., dissenting).

Today, we have a very different conception of the scope and frequency of federal criminal prosecution than did the Framers. But changes in federal policy do not trump constitutional rules. What is more, there is not even a conflict in policy. The many and varied federal and state crimes that coexist today create a system of vast prosecutorial discretion. Moreover, applying this Court's long-standing interpretation of what definitionally constitutes the "same offence" reveals that this substantial discretion exists even where there has already been a prosecution concerning a particular historic event. Indeed, it is possible that even the crimes at issue in this very case are two

different offenses under *Blockburger v. United States*, 284 U.S. 299 (1932).[1] *See* 18 U.S.C. § 922(g)(1) (2012) (requiring "a crime punishable by imprisonment for a term exceeding one year" and also "affecting commerce"); Ala. Code § 13A-11-72(a) (2018) (incorporating diverse predicate offenses); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (explicating "a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws").

It is an almost impossible claim, therefore, that acknowledging a double jeopardy prohibition against duplicative state and federal prosecutions could seriously hamper the prosecutorial prerogatives of either the state or federal governments. There will be exceedingly few 'races to the courthouse' because so many avenues are open to both state and federal prosecutors. But in the rare instance when the second prosecution is for the identical offense already prosecuted, the text and animating purposes of the Double Jeopardy Clause dictate that the courthouse door should be closed.

Thus, on first blush, it is surprising to see this Court's historic pronouncements in favor of a federal/state dual sovereignty exception. A close look at those opinions, however, is revealing. Not only were the strongest pronouncements perhaps influenced by contexts of arguable federal crisis, *see* Br. of Amici

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[1] Amici take no position on whether such argument has been forfeited in this case; what we emphasize is that, under *Blockburger*, there is not even strongly reasoned policy for preserving a dual sovereignty exception.

Curiae Law Professors in Supp. of Pet'r 7-17, but all of the early cases stated the proposition in dicta, and they did so long before this Court settled on the *Blockburger* interpretation of same offense. Most importantly, this Court has never reconsidered the dual sovereignty exception after holding in 1969 that the double jeopardy protection is—contrary to the Court's earlier conception—incorporated as against the States. *Compare Benton v. Maryland*, 395 U.S. 784, 787 (1969) (incorporating the right), *with Bartkus v. Illinois*, 359 U.S. 121, 124-28 (1959) (discussing incorporation).

Considered in context, therefore, a rejection of a federal/state dual sovereignty exception would follow in the pattern of this Court's precedents. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (rejecting a previous federal/state exception to the Fifth Amendment privilege against compelled self-incrimination); *Elkins v. United States*, 364 U.S. 206 (1960) (rejecting a previous federal/state exception to the Fourth Amendment exclusionary rule). If a state police officer's decisions can, as the Court held in *Elkins*, effectively bind a federal prosecution; and if a State's grant of prosecutorial immunity can, as the Court held in *Murphy*, effectively bind a federal prosecution; then it is hardly surprising that a State's *prosecution* should do the same. *See United States v. Balsys*, 524 U.S. 666, 683 (1998) ("After *Murphy* . . . the state and federal jurisdictions *were as one* . . . ." (emphasis added)).

In short, when it comes to the power of the United States to prosecute the identical offense already prosecuted by a constituent State, any purported "dual

sovereignty" exception to the double jeopardy right is not supported by constitutional text, history, political theory, or even by good policy.

ARGUMENT

I. The drafting history of the Double Jeopardy Clause strongly suggests that the Framers rejected a dual sovereignty exception.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." When an early draft of the Clause was being debated in Congress, one member of the House of Representatives proposed an amendment that would have limited the Clause to federal offenses. That proposed amendment was rejected.

This significant detail of the Clause's drafting history has gone virtually unmentioned in the Court's jurisprudence. *But see Abbate v. United States*, 359 U.S. 187, 203-04 (1959) (Black, J., dissenting) (briefly mentioning the rejected amendment). The rejection of the amendment strongly suggests, however, that the framers and ratifiers of the Clause understood that it would apply to *any* successive federal prosecution, whether that prosecution followed a prior federal prosecution or a prosecution by a State.

On Aug. 17, 1789, the House of Representatives was considering the proposed Double Jeopardy Clause in

the form submitted to it by James Madison: "No person shall be subject, [except] in "cases" of impeachment, to more than one trial or one punishment for the same offence . . . ." 1 Annals of Cong. 781 (1789) (Joseph Gales ed. 1834).[2] After an unrelated motion by Rep. Egbert Benson was defeated, Rep. George Partridge of Massachusetts "moved to insert after 'same offence,' the words 'by any law of the United States.' " *Id.* at 782. But "[t]his amendment was lost also." *Id.* Had the Partridge motion passed, the Clause would then have read: "No person shall be subject except in cases of impeachment, to more than one trial or one punishment for the same offence by any law of the United States."

Unfortunately, there is no record of the debate or the numerical vote on this motion. Its rejection therefore seems susceptible of three interpretations.

First, perhaps the motion was meant to limit the double jeopardy constraint to the federal government, such that its rejection broadens the constraint to similarly prohibit the States from prosecuting twice for the same offense. *See* Jay A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 30-31 (1969) (suggesting that the motion's defeat implies "that double jeopardy may have been intended to apply to the states and the federal government alike"). This interpretation is highly implausible for at least two reasons. First, in no place in the Bill of Rights except for the first word of the First Amendment ("Congress"), and

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[2] The Annals of Congress erroneously omits the word "except."

in the phrase "any court of the United States" in the Seventh Amendment, is there an explicit limitation of the Bill to the federal government.[3] Yet, as far as we know, there were no other efforts to clarify the limited scope of the Bill; had a Member of Congress wanted to include such a limitation, there are many other places where he would have done so. It would have seemed far more obvious, for example, to include such a limitation at the beginning of what became the Sixth Amendment, which begins: "In *all* criminal prosecutions . . ." U.S. Const. amend. VI (emphasis added).

No such limitations were proposed because the common understanding of the founding generation was that the Bill implicitly bound only the federal government and not the States. As this Court said in *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), the Constitution's "limitations on power, if expressed in general terms, are naturally, and . . . necessarily, applicable to the government created by the" Constitution, i.e., the federal government. The Court reached this unanimous conclusion without "much difficulty." *Id.*

The second reason that such an interpretation is not plausible is that Rep. Partridge was a Federalist, and a pro-administration Federalist at that. *See* John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. Pol. 295, 322

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[3] The first two proposed amendments, which went unratified in 1791, also explicitly applied only to the federal government. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8-19 (1998).

(1993). As such, Partridge would have had no interest in limiting the reach of the Bill solely to the federal government. To the contrary, Federalist ideology supported the enhancement of the powers of the federal government at the expense of the powers of the States. For him to have moved to clarify that a constraint in the Bill of Rights applied only to the federal government and did not apply to the States would have made little sense.

Second, Partridge could have been using the word "law" to mean only statutory—not decisional—law, attempting to limit the Double Jeopardy Clause to only statutorily defined crimes and not common law crimes. Such an interpretation might be consistent with his political inclinations, given that such a move would enhance federal power by limiting the constraints of the Clause. But this interpretation is implausible for a separate reason.

Partridge would have known that the only basis for federal jurisdiction over federal crimes was the first clause of Article III, Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, *the Laws of the United States*, and Treaties made, or which shall be made, under their Authority . . . ." (emphasis added). If this judicial authority included the power to recognize and adjudicate federal common law crimes, then the phrase "the Laws of the United States" would necessarily include common law. Thus, pursuant to this second interpretation, Partridge would have believed both (1) that "laws of the United States" in Article III included the common law but, (2) that his proposed, virtually identical "law of the

United States" included only statutory law. That is implausible, to say the least.

Third, and most plausibly, by rejecting the Partridge motion, the framers of the Double Jeopardy Clause could have been rejecting the very dual sovereignty exception that this Court later created in *United States v. Lanza*, 260 U.S. 377 (1922), and reaffirmed in *Abbate*, 359 U.S. at 195. That is precisely how Justice Black understood the failed motion. *See id.* at 204 (Black, J., dissenting) ("I fear that this limitation on the scope of the Double Jeopardy Clause, which Congress refused to accept, is about to be firmly established as the constitutional rule by the Court's holding in this case . . . ."). Partridge, a pro-administration Federalist, likely understood that without his proposed limiting phrase, the Clause would be understood as forbidding a federal prosecution following a prior prosecution for the "same offence," whether that first prosecution was by the federal government *or by a State*.

Given the lack of historic record, we of course cannot be sure who voted to defeat Partridge's motion, nor why they did so. We can, however, make some educated guesses. Because Federalists greatly outnumbered Anti-Federalists in the First Congress, presumably it required a bloc of Anti-Federalists and anti-administration Federalists—a bloc that would soon achieve political dominance as Jeffersonian Republicans, *see* Aldrich & Grant, *supra*, at 301—to defeat the motion. They likely did so to give the Clause, and the rest of the Bill of Rights, the full import of their Anti-

Federalist design: to limit federal prosecutorial power in favor of that of the States.

The Bill of Rights was demanded by the Anti-Federalists in large part because they wanted to maintain the states' virtual monopoly on criminal justice. Some Anti-Federalists went so far as to claim that Congress's authority to define and punish crimes did not extend past the four crimes expressly enumerated in the Constitution. *See* Adam H. Kurland, *First Principles Of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 Emory L.J. 1, 54 (1996). Some Jeffersonian Republicans later repeated this claim, including Thomas Jefferson himself. *See* Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* The Virginia and Kentucky Resolutions of 1798 and '99 16 (Jonathan Elliott ed. 1832). Even those in the founding generation who did not share this rather extreme position saw a very limited role for the federal government to mete out criminal punishment. After all, the Anti-Federalists feared that the new, powerful central government might abuse whatever power it was given to create, prosecute, and punish crime, in order to oppress its enemies. *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 158-59 (2001). They sought to keep that power tightly cabined via a set of procedural restrictions that became a large portion of the Bill of Rights.

In this manner, the power to punish crime would overwhelmingly remain where it had been, in some instances, for over a century and a half: with the States.

See Amar, *supra*, at 5 (observing that Virginia had existed as a legal entity "since the 1620s"). By subjecting the federal government to the same set of restrictions that constrained the States, the criminal procedure protections of the Bill of Rights would dampen the incentives that the federal government would otherwise have to displace state criminal law with federal criminal law. *See* Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69, 106 (2012). The Bill thus helped ensure that the States' primacy in defining and punishing crimes was to be maintained.

Viewed in this context, the House of Representatives' rejection of the Partridge motion dovetails almost perfectly with the major thrust of the Anti-Federalist project that was the Bill of Rights. Partridge endeavored to carve a significant hole into the Double Jeopardy Clause, leaving the federal government free to prosecute the "same offence" after a conviction—or even after an acquittal—in state court. Under such a regime, Congress could not only create a parallel universe of criminal law that overlapped substantially with that of the States; it could also wield this law irrespective of the outcomes of prior state cases involving the same offenses by the same defendants. The States' virtual monopoly over criminal justice would be destroyed, and the nascent Jeffersonian coalition would have none of it.

Concededly, some informed speculation is necessary to interpret the import of the failed Partridge motion. But the best educated guess is that it shows that the Framers contemplated and rejected the very dual

sovereignty exception this Court engrafted onto the Double Jeopardy Clause in *Lanza* and *Abbate*. The Court in those cases unfortunately ignored the failed Partridge motion, despite Justice Black's raising it in dissent in *Abbate*. Indeed, in neither case did the Court provide historical support from the founding era for its creation of a dual sovereignty exception. Instead, as explained in greater detail below, *see infra* Part IV.B., the Court placed primary reliance on a series of cases decided over fifty-five years after ratification of the Fifth Amendment. *See Abbate*, 359 U.S. at 190-92 (discussing *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852)). Thus, not only did the Court in *Lanza* and *Abbate* ignore the only available evidence regarding the drafting history of the Double Jeopardy Clause, but its ahistorical invention of a dual sovereignty exception to the Clause is at war with the best interpretation of that evidence.

II. This Court's double jeopardy sovereignty test confirms that the federal government is not a sovereign completely independent of the states.

For double jeopardy purposes, "sovereignty . . . does not bear its ordinary meaning." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016).

> To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question. The inquiry does not turn, as the term "sovereignty" sometimes

> suggests, on the degree to which the second entity is autonomous from the first or sets its own political course. Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same "ultimate source."

Id. at 1867. "The degree to which an entity exercises self-governance . . . plays no role," and "the inquiry (despite its label) does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity." *Id.* at 1870.

Instead, the "single criterion"—"the 'ultimate source' of the power undergirding the respective prosecutions," *id.* at 1871—can be determined through a bit of constitutional geometry:

> Whether two prosecuting entities are dual sovereigns in the double jeopardy context, we have stated, depends on "whether [they] draw their authority to punish the offender from distinct sources of power." The inquiry is thus historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority. If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not.

Id. (citation omitted).

Such 'lines of sovereignty' for each of our original thirteen states blink into existence sometime between 1776 and 1783—perhaps with the 1776 Declaration of Independence, perhaps with the adoption of each state Constitution, perhaps with the 1781 ratification of the Articles of Confederation, or perhaps with the 1783 Treaty of Paris. Fortunately, the precise date does not matter. What does matter is that each of the thirteen states was originally a separate sovereign, each constituting a distinct "parallel line."

So, thirteen parallel 'sovereignty lines' begin by 1783, and they continue until they intersect at a single hub in 1788 with the ratification of our federal Constitution. It might be unclear whether those state lines emerge unscathed. *See, e.g.*, Akhil Reed Amar, America's Constitution: A Biography 21-39 (2005) (chronicling how adoption of the Constitution was "in a manner of speaking, the world's largest corporate merger"). But that is a matter for another day.[4] What is critical is that it seems impossible to imagine how such ratification created an *additional* federal

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[4] In *Sanchez Valle*, this Court acknowledged fundamental difficulties in drafting the origin "lines" for the other thirty-seven states as independent from the federal government, but felt that it would be intolerable to treat those states differently than the original thirteen for purposes of double jeopardy. 136 S. Ct. at 1871 n.4 (treating the later states differently "contradicts the most fundamental conceptual premises of our constitutional order, indeed the very bedrock of our Union"). Yet were there no dual sovereignty exception, this structural crisis vanishes.

"sovereign" *independent of* those thirteen constituent sovereign states—for if it *were* independent, its laws could not be supreme over them. *Cf.* U.S. Const. art. VI. Instead, the federal government and the States "draw their power from the same ultimate source," *Sanchez Valle*, 136 S. Ct. at 1871, namely the free and independent States of 1776/1783. While the 1788 Constitution certainly provides the "current exercise" of federal prosecutorial authority, its "deepest wellsprings" instead extend back to the States and their separation from England.[5]

Stated another way, in creating our federal structure, "[t]he Framers split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), "divid[ing it] between the government of the Union, and those of the States," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Framers did not, by contrast, *clone* or *duplicate* sovereignty. Thus, just as "the oldest roots of Puerto Rico's power to prosecute lie in federal soil," *Sanchez Valle*, 136 S. Ct. at 1868, the oldest roots of the federal government's power to

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[5] It is telling that in *Sanchez Valle* this Court rather exhaustively described why neither the States nor the Indian tribes derive their authority from the federal government, *see* 136 S. Ct. at 1871-72, why municipalities do derive their authority from their respective States, *see id.*, and why U.S. territories do derive their authority from the United States, *see id.* at 1873—yet nowhere did the Court attempt to explain how the federal authority could be seen as anything *but* derived from that of the States. How could the "ultimate source," "all the way back," *id.* at 1875, for federal authority be anything but a concession from the constituent States?

prosecute lie in state soil, a power the States collectively ceded in 1788 by creating our federal system.

This is not unlike a single State ceding certain powers to a municipality, which this Court has recognized does not create an independent double jeopardy sovereign. *See Waller v. Florida*, 397 U.S. 387 (1970). To use the language of *Sanchez Valle* in explaining that rule, "[b]ecause a State [(in our case, the thirteen states)] must initially authorize any [municipal] charter [(in our case, our federal Constitution)], the State is the furthest-back source of prosecutorial power." 136 S. Ct. at 1875. And just as "Puerto Rico's transformative constitutional moment does not lead to a different conclusion," *id.* at 1875, neither does that of the federal government.

In creating our constitutional structure, the thirteen sovereign States each effectively ceded powers 'x' and each retained powers '1-x.' As this Court has declared, "[t]he delegator cannot make itself any less so—no matter how much authority it opts to hand over." *Id.* at 1876. As any child might tell us, we can split a cookie into two parts, but it would be remarkable to assert that we just created a second cookie.

Using this Court's historic test, then, the federal government is not a double jeopardy "sovereign" independent of its constituent States.

III. A dual sovereignty exception runs contrary to the purposes of double jeopardy and is unnecessary given the *Blockburger* "same offence" analysis.

Pragmatic considerations also cast doubt on the dual sovereignty exception. The goal of double jeopardy protection is to shield people from the "continuing state of anxiety and insecurity" that would result if the government "with all its resources and power . . . [could] make repeated attempts to convict an individual for an alleged offense." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009) (citation omitted). This is no less true when "repeated attempts" take the form of parallel or successive state and federal prosecutions for an identical offense, rather than multiple prosecutions under a single state or federal statute. The underlying concern—that multiple prosecutions will "enhanc[e] the possibility that even though innocent [a defendant] may be found guilty"—holds both ways. *Id.* at 118.

The point is made especially vivid by considering a slight variation on the case at hand, involving an initial acquittal instead of an initial conviction. Because acquittals "represent[ ] the community's collective judgment," their "finality is unassailable," *id.* at 123, and they merit "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982). This Court has thus described protecting the "integrity" of acquittals as the "primary purpose of the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. 82, 92 (1978). Imagine, then, if at time t_1, rather than being convicted on felon-in-possession charges in Alabama, Terance Gamble

had gone to trial and obtained a verdict of not guilty, but at time t_2, the U.S. Attorney for the Southern District of Alabama still decided to press federal charges for the identical offense.

On the government's theory, there is nothing infirm about this hypothetical. That the two prosecutions stem from different, though substantively identical, code provisions—one federal and one state—ends the inquiry. Yet it is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence [that] '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). In the hypothetical, what would the t_2 prosecution be, in practical effect, if not a review of the acquittal at t_1? It is telling that the government, in cases concerning the scope of issue preclusion after an acquittal, routinely invokes the principle that prosecutors deserve "one full and fair opportunity" to try their case. *See, e.g.*, Brief for the U.S. at 53, *Bravo-Fernandez v. United States*, 137 S. Ct. 352 (2016) (No. 15-537), 2016 WL 4610960, at *53 (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). And so prosecutors do; but by the same token, once that opportunity ends in an acquittal, it should bind all subsequent prosecution for the "same offence." Some swords come double-edged.

Nor do arguments the other direction—focused on governmental interests—fare better. At bottom, the government offers two policy defenses of the dual sovereignty exception. The first is that, absent this

doctrine, different enforcement institutions would have difficulty coordinating their prosecutorial efforts. Br. for the U.S. in Opp'n 10-11. Setting aside the fact that government convenience is not typically the lodestar of constitutional rights, this Court has acknowledged—and common sense confirms—that cooperation between federal and state authorities is neither rare nor arduous. *Bartkus v. Illinois*, decided over a half-century ago, spoke plainly on this point, noting that federal-state coordination has long been a "conventional practice . . . of prosecutors throughout the country." 359 U.S. 121, 123 (1959). If anything, this is even truer today, *see* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011), and unsurprisingly so, given the shared source of ultimate authority between the States and the federal government in our constitutional system—and the need to divvy up the "atom of sovereignty" in practice.

The government's second policy argument is that the Fifth Amendment, by its plain terms, bars successive prosecution only for "the same offence," and when two otherwise-identical offenses appear in distinct codebooks, they are categorically different for double jeopardy purposes. In other words, when an offense appears in two statutory schemes, even if the terms of the offense are identical, the two are necessarily different offenses for double jeopardy purposes because they serve the interests of two different governments.

This argument also fails. The *Blockburger* test, which no one here questions, already does the job of ensuring that offenses implicating distinct state

interests will qualify as different offenses for double jeopardy purposes. The reason is simple: offenses that vindicate different interests often, if not always, have at least some elements out of common. And the inverse is also true. Where two offenses are the same for *Blockburger* purposes, they serve the same interests, even if one offense is defined by state law and the other by federal law.

Blockburger holds offenses to be different if each requires "proof of [an] element" that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Thus, a statute that proscribes burglary with a firearm is a different *Blockburger* offense from a statute that proscribes burglary at night, even if both are violated in the same incident. Likewise, given the alternative ways a violation of the Alabama firearms offense can be proved, it might constitute a different offense, for *Blockburger* purposes, than the federal equivalent. *See* 18 U.S.C. § 922(g)(1) (requiring "a crime punishable by imprisonment for a term exceeding one year" and also "affecting commerce"); Ala. Code § 13A-11-72(a) (incorporating diverse predicate offenses); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (explicating "a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws"). Therefore, although the Government may have forfeited this argument, there is a plausible claim that in Petitioner's actual case, the parallel prosecutions were permissible because they arose from different offenses. What makes this claim colorable, however, is a substantive difference between the statutes' elements, not a formalistic difference between their origins.

By pressing the "same offence" justification for the dual sovereignty exception, the government argues, in effect, for an extension of *Blockburger*: a regime that requires defendants to show not only that two offenses have common elements, but also that they occupy the same codebook. As a matter of principle, this is unwise; it drains the Double Jeopardy Clause of its protective force. And as a matter of practice, it is unnecessary. The government has pointed to no cases—presumably because none exist—where *Blockburger* would be insufficient to permit prosecutors to vindicate different interests violated by the same conduct. Layering a dual sovereignty exception on top of the *Blockburger* rule would serve only to facilitate the circumvention of double jeopardy protection by state and federal authorities, as it did in the instant case.

IV. The dual sovereignty history is less clear than the government claims.

If—as we have argued—the drafting history, the text, and the underlying political theory of the Fifth Amendment, combined with this Court's definition of 'double jeopardy sovereignt' as well as considerations of policy, all point away from a federal/state dual sovereignty exception, how did one ever come about? Scrutiny reveals a fragile exception ripe for reversal.

A. The evolution of "same offence" has undermined the Court's dual sovereignty cases.

This Court has never decided the precise issue now before it. The Court's double jeopardy jurisprudence for decades assumed an equivalence between "same acts" and "same offence," undoubtedly due to the equivalence generally prevailing at common law in simpler times. Thus, all of the Court's dual sovereignty discussions have concerned both sovereigns prosecuting the *same acts*, while the Double Jeopardy Clause, of course, forbids placing a defendant twice in jeopardy for the *same offense*.

This dichotomy arose because the rules changed over time. All of the dual sovereignty cases until *Abbate v. United States*, 359 U.S. 187 (1959), were decided before this Court crystalized the definition of "same offence" in *Blockburger v. United States*, 284 U.S. 299 (1932).[6] The *Abbate* Court, unfortunately, failed to account for "same offence" being a narrower concept than "same act." Indeed, the Court conflated the two concepts in stating the issue: "[T]his case squarely raises the question whether a federal prosecution of defendants already prosecuted for the

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[6] To be sure, *Blockburger* does not mention the Double Jeopardy Clause and could, conceivably, be applying a common-law test to determine when statutory offenses define one or more offense when violated by a single act. As *Brown v. Ohio*, 432 U.S. 161, 166 (1977), and subsequent cases make clear, however, the modern Court considers the *Blockburger* test to be part of the double jeopardy inquiry.

same acts by a State subjects those defendants 'for the same offense to be twice put in jeopardy of life or limb' in violation of the Fifth Amendment." *Abbate*, 359 U.S. at 189-90.

Given how natural it is to think of double jeopardy protections in terms of 'acts,' perhaps it is not surprising that even recent cases speak in this manner. *E.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) ("So the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws."). But natural or no, the Eleventh Circuit in this case conflated "offense" with "conduct" when it wrote, "The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause . . . ." *United States v. Gamble*, 694 F. App'x 750, 750 (11th Cir. 2017).

In *Blockburger*, this Court held that "acts" and "offense" are not necessarily co-extensive: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. No federal/state dual sovereignty case from this Court has ever applied this test when discussing whether both sovereigns can prosecute for the same crime. Whatever its merits generally, the *Blockburger* test is suited equally well to prosecutions in different jurisdictions (like this case) as to prosecutions in the same jurisdiction.

If the two firearms offenses are identical under *Blockburger*, and all parties have assumed this to be true, this case presents the Court with an ideal opportunity to hold that the federal government may not prosecute the identical offense, consisting of the same elements, that led to a state verdict. As long as the two sovereigns can each prosecute the same criminal act, but not the identical offense, the policy behind the dual sovereignty doctrine is fully satisfied—respecting each sovereign's prosecutorial interests—without acting contrary to the text of the Double Jeopardy Clause, which prohibits being twice placed in jeopardy for the same offense. As explained in Part III, *supra*, there will be many overlapping but not identical offenses from which each sovereign can vindicate its interest in preventing and punishing crime. *Blockburger* thus preserves the power of both the states and the federal government to advance their respective interests by prosecuting the same person for the same conduct, so long as those interests are not identical. But where they are, and *Blockburger* declares that the "same offence" has occurred, the inquiry should end.

B. The dual sovereignty precedents are fragile.

The United States claimed in its brief in opposition to certiorari that the Court has been applying the dual sovereignty doctrine for more than 150 years. Br. for the U.S. in Opp'n 4. This claim is exaggerated.

To begin, the claim ignores the Court's first case to acknowledge the potential of dual prosecutions, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). Justice Washington's opinion announcing the judgment in *Houston* stated that a judgment in state court would bar a federal prosecution for the same offense. *Id.* at 31. Admittedly, as the United States points out in its brief, this statement is not inconsistent with the modern view of dual sovereignty because the situation envisioned by Washington involved two judgments, one state and one federal, based on a violation of *one statute*. What the United States ignores, however, is the reason Washington imagined two judgments based on a violation of a single statute: He rejected the "novel and unconstitutional doctrine" that states can legislate "upon any subject on which Congress has acted." *Id.* at 24. Only one justice disagreed with this statement. *See id.* at 33-34 (Johnson, J., concurring). If states cannot criminalize the same conduct, of course, dual prosecutions are not possible. *Houston* thus, in dicta, *rejected* the dual sovereignty doctrine.

The '150 years' of dual sovereignty relied on by the United States begin with *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), but the Court's opinion there is an odd way to "apply" the doctrine. First, it is but dicta; there was only one prosecution in *Fox*. More significantly, the embrace of dual sovereignty came hedged with an exhortation that it would occur only "in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 435.

There the issue lay, quiescent for seventy years, the Court having ignored the *Houston* dicta to embrace

the notion that each sovereign *could enact* criminal offenses within its sphere of power, and expressing dicta that there could even be *dual prosecutions*. But despite repeating the dicta in several cases, the Court never upheld dual prosecutions until *United States v. Lanza*, 260 U.S. 377 (1922), decided two years after the Volstead Act became effective to enforce Prohibition. In affirming the federal prosecution for the same alcohol-related conduct for which Lanza had been convicted in state court, the Court quoted the *Fox* language that dual prosecutions would not be routine but, rather, would occur only in "instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 383 (quoting *Fox*, 46 U.S. at 435).

While today we have a difficult time imagining Prohibition demanding "extraordinary rigor," by the time *Lanza* was decided, forty-six of forty-eight states had ratified the Eighteenth Amendment. *See* Henry S. Cohn & Ethan Davis, *Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 Quinnipiac L. Rev. 327, 328 (2009). The *Lanza* Court noted that the Amendment "was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce." 260 U.S. at 381. Moreover, after quoting the "extraordinary rigor" language from *Fox*, the Court noted that the judgment it reversed was "the *only* District Court which has held conviction in a state court a bar to prosecution for the same act under the Volstead Law." *Id.* at 384 (emphasis added). The *Lanza*

Court, reflecting public opinion manifested in the Eighteenth Amendment, seemed to believe that the alcohol problem required a strong, uniquely federal solution. It is difficult to make that case for the thousands of federal criminal offenses today.[7] Moreover, the *Lanza* Court relied heavily on the fact that the Double Jeopardy Clause applied only to the federal government, which is obviously no longer true. *See id.* at 382.

Lanza was accepted by *Abbate* in 1959. Yet when citing and quoting *Fox*, *Abbate* ignored the "enormity" and "extraordinary rigor" language that *Lanza* prominently displayed. *Abbate* neglected to apply the *Blockburger* test. And *Abbate* then declined to overrule *Lanza* because the Court believed that "undesirable consequences would follow if *Lanza* were overruled." 359 U.S. at 195. As demonstrated in Part III, *supra*, however, any such adverse consequences are

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[7] In particular, the problem of firearms possession by felons, involved here, hardly requires a uniquely federal response. First, virtually every state maintains some prohibition on firearms possession by felons. *See* Margaret C. Love et al., Collateral Consequences of Criminal Convictions: Law, Policy & Practice app. A-2 (2016). Moreover, such prohibitions have a far longer pedigree in the states than at the federal level. While state felon-in-possession constraints date back to the founding generation, *see Drake v. Filko*, 724 F.3d 426, 450 (3d Cir. 2013) (Hardiman, J., dissenting), the first federal felon-in-possession statute did not appear on the scene until 1938, *see United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). Finally, amici are unaware of any systemic problem of states so drastically under-punishing felons in possession so as to implicate the danger of frustrating federal policy in this area.

avoided by measuring dual prosecutions under the narrow *Blockburger* test of "same offence," rather than measuring by the broader concept of "same conduct."

The history of dual sovereignty thus consists of an initial rejection in dicta, a tepid embrace in dicta with the limiting language of "enormity" and "extraordinary rigor," a series of cases embracing the dicta without the limiting language, a holding that included the limiting language, and, finally in 1959, a holding without the limiting language. It is certainly not as sturdy a history as the United States has suggested.

* * *

A key factor that this Court considers in deciding whether to overrule precedent is whether it was "well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). A doctrine that is at odds with basic textual principles, that ignores a critical event in drafting history, that is inconsistent with the Court's conception of sovereignty, and that relies on anemic foundational cases can hardly be considered "well reasoned." The Court has also instructed that "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016) (citation omitted). This certainly applies to the dual sovereignty exception, which was born in an era when the surrounding doctrine was still in its infancy, before development of the *Blockburger* definition of same offense, and before

incorporation of the Double Jeopardy Clause. For all these reasons, *Lanza* and *Abbate* should be overruled.[8]

CONCLUSION

As Justices Ginsburg and Thomas have recognized:

> Current "separate sovereigns" doctrine hardly serves [the Double Jeopardy Clause's] objective. States and Nation are "kindred systems," yet "parts of one whole." Within that whole is it not "an affront to human dignity," "inconsistent with the spirit of [our] Bill of Rights," to try or punish a person twice for the same offense?

Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (Ginsburg, J., concurring) (emphasis omitted) (citations omitted).

This case presents the easiest and clearest instance in which a 'dual sovereigns' exception runs

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[8] In overruling *United States v. Lanza*, 260 U.S. 377 (1922), and *Abbate v. United States*, 359 U.S. 187 (1959), this Court need not overrule either *Bartkus v. Illinois*, 359 U.S. 121 (1959), or *Heath v. Alabama*, 474 U.S. 82 (1985). That is to say, the reasons that this Court should reject a dual sovereignty exception with respect to a federal prosecution following a state prosecution do not necessarily apply with the same force to a state prosecution following either a federal prosecution or a prosecution by a sister state. Amici take no position on these issues.

contrary to the text, tradition, and policy of the double jeopardy protection. The state and federal offenses have been conceded to be identical. No policy reason supports the duplicative prosecution. The federal government, historically the delegee of sovereign power, presumes to prosecute in the wake of a prosecution by a State, historically the delegator of such power. This Court should restore the protection to its rightful place, reversing the Eleventh Circuit and holding that the United States may not bring a second, duplicative prosecution for the identical criminal offense after Alabama has already sought and achieved a conviction for the same.

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September 11, 2018

No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW THURGOOD MARSHALL CIVIL RIGHTS CENTER IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is the Howard University School of Law Thurgood Marshall Civil Rights Center ("TMCRC"). Howard University is one of the oldest historically Black institutions of higher learning in the United States, established by congressional charter in 1867 in the aftermath of the Civil War. The Law School, established in 1869, will celebrate its sesquicentennial in 2019. "In the 20th century, [the Law School] ... emerged as a 'clinic' on justice and injustice in America, as well as a clearinghouse for information on the civil rights struggle."[2] Consistent with these principles and the Mission of Howard University,[3] the TMCRC has an interest in the just

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part and no party or counsel made a monetary contribution for the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] *Our History*, http://law.howard.edu/content/our-history (last visited Aug. 23, 2018).

[3] The Howard University Mission Statement provides:

> Howard University, a culturally diverse, comprehensive, research intensive and historically Black private university, provides an educational experience of exceptional quality at the undergraduate, graduate, and professional levels to students of high academic standing and potential, with particular emphasis upon educational opportunities for Black students. Moreover, the University is dedicating to attracting and sustaining a cadre of faculty who are, through their teaching, research and service, committed to the development of distinguished, historically aware, and compassionate graduates and to the discovery of

and robust enforcement of the federal criminal civil rights laws. Successive prosecutions are uncommon. When they do occur, federal criminal civil rights cases constitute a measurable portion of federal prosecutions occurring after a state prosecution. Resolution of the continuing validity of the dual sovereignty doctrine will impact on the future direction and effectiveness of federal civil rights enforcement. The TMCRC takes no position on whether the dual sovereignty doctrine should be overruled. If dual sovereignty survives, the status quo concerning federal criminal civil rights enforcement would remain unchanged. This amicus brief is intended to supplement the principal briefs by providing additional historical and legal analysis concerning the impact on federal criminal civil rights enforcement should the dual sovereignty doctrine be abolished.

SUMMARY OF ARGUMENT

The TMCRC recognizes the significant burdens associated where an individual is subject to multiple prosecutions and punishments for the same or similar underlying conduct. Most federal criminal civil rights excessive force prosecutions charge violations of 18 U.S.C. § 242, which concern *conduct* that is also prosecutable under numerous state laws. The federal government possesses the solemn obligation to vigorously enforce the Nation's civil rights laws, including the relevant federal criminal civil rights laws. Consequently, any modification or abolition of the dual

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solutions to human problems in the United States and throughout the world. With an abiding interest in both domestic and international affairs, the University is committed to continuing to produce leaders for America and the global community. https://www2.howard.edu/about/mission (last visited Aug. 23, 2018).

sovereignty doctrine will necessarily impact the future direction of federal criminal civil rights enforcement.

Abolishing the dual sovereignty doctrine inevitably will create some degree of uncertainty concerning the complex tapestry of double jeopardy doctrine that would, for the first time, now apply to inter-sovereign prosecutions. Under *Blockburger v. United States*, federal civil rights statutes concerning law enforcement misconduct are not the "same offense" as State statutes that may cover the same or similar underlying conduct. Thus, overruling dual sovereignty should not eliminate the federal government's ability to prosecute these types of civil rights cases after the State has previously prosecuted a case that was tried to verdict.

Additionally, in a criminal case, the government is often without the kind of "'full and fair opportunity to litigate' that is a prerequisite of estoppel." The "collateral estoppel" or "issue preclusion" component of double jeopardy should not be unnecessarily altered or otherwise expanded by any decision in this case so as to adversely bind the federal government, a non-party in any prior State prosecution, from litigating an issue purportedly "necessarily resolved" in the defendant's favor in a prior State trial.

Finally, the paramount importance of civil rights, and the fact that the Fourteenth Amendment places limitations on state action, support a civil rights "exception" to double jeopardy. If dual sovereignty is retained, this issue is moot. Although this case does not concern police misconduct or federal civil rights enforcement, a decision to abolish dual sovereignty inevitably will require reexamination of several interrelated double jeopardy issues that impact on federal criminal civil rights enforcement. Should the

Court abolish the dual sovereignty doctrine, the Court's *ratio decidendi* should not adversely affect or otherwise foreshadow any particular outcome when the framework of a civil rights "exception" ultimately arises in future litigation.[4]

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[4] The double jeopardy clause is principally designed to prevent the government with unlimited resources from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety." *Green v. United States*, 355 U.S. 184, 187-88 (1957). Many commentators contend that the Framers intended to model double jeopardy principles after English common law principles, which purportedly did not include dual sovereignty principles.

On the other hand, this Court has held numerous times that dual sovereignty "finds weighty support in the historical understanding and political realities of the States' role in the federal system." *Heath v. Alabama*, 474 U.S. 82, 92 (1985). Justice Frankfurter dismissed the purported English precedents as "dubious....because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus v. Illinois*, 359 U.S. 121, 128 n.9 (1959); *see also United States v. Gillock*, 445 U.S. 360, 369 (1980)(recognizing "our structure of federalism which had no counterpart in England"). "Federalism thus appears to have been the issue around which the controversy over the Constitution turned," as the Framers created a unique federalism system "without precedent." Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, in The Framing and Ratification of the Constitution 132 (Levy & Mahoney ed. 1987).

The briefs filed at the certiorari consideration stage and the Brief for Petitioner (Gamble), No. 17-646 (Sept. 4, 2018), indicate that the parties will comprehensively address the methodology in evaluating whether this Court should overrule long standing precedent. This brief, while taking no position on the fate of dual sovereignty, focuses on how federal criminal civil rights enforcement, particularly police brutality prosecutions, could be affected if dual sovereignty is abolished.

ARGUMENT

I. A FEDERAL PROSECUTION UNDER 18 U.S.C. § 242 IS NOT THE "SAME OFFENSE" AS A STATE HOMICIDE, RECKLESS ENDANGERMENT, ASSAULT, OR OTHER SIMILAR PROSECUTION

A. The *Blockburger* Test Would Remain in Force Even if Dual Sovereignty is Abolished

Many of the most notable successive or dual criminal prosecutions concern federal civil rights prosecutions commenced after a state prosecution that was tried to verdict. For example, *United States v. Guest*, 383 U.S. 745 (1966), was a federal prosecution based on the Georgia murder of American serviceman Lemuel Penn. A prior state murder prosecution resulted in an acquittal. Michal R. Belknap, Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown* South 186-189 (1987).[5] The murder of civil rights worker Viola Liuzzo in the aftermath of the Selma to Montgomery Civil Rights March resulted in state court acquittals. A subsequent section 241 federal civil rights conspiracy prosecution was successful. *Id.* at 190-192. More recently, the Rodney King trials in Los Angeles resulted in a section 242 federal prosecution after prior state court acquittals. *See United States v. Koon*, 34 F.3d 1416, 1425 (9th Cir. 1994)(referencing prior state court acquittals).

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[5] For a comprehensive account of the Penn murder and subsequent prosecutions, see Michal R. Belknap, *The Legal Legacy of Lemuel Penn*, 25 How. L.J. 467 (1982).

The *Blockburger* test to determine whether two offenses are the "same offense" under the double jeopardy clause matured during the dual sovereignty regime. *Blockburger v. United States*, 284 U.S. 299 (1932). Under *Blockburger*, a defendant may be prosecuted for the same act under two distinct statutes if each offense requires proof of an element not contained in the other. *See id.* at 304. States have long possessed the authority to provide greater individual rights protections than those required under the federal constitution, including double jeopardy protections. *See generally Cooper v. California*, 386 U.S. 58, 62 (1967)(stating analogous hornbook proposition that a State possesses the "power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so"); *see also Bartkus v. Illinois*, 359 U.S. 121, 133-148 (1959)(discussing state statutory permutations limiting dual sovereignty). These statutory experiments are part of our "laboratory" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandies, J., dissenting), but have often proven difficult to apply, with many of the statutes embodying awkward statutory formulations making it problematic to assess whether a particular prosecution is barred before the second trial takes place. *See Bartkus*, 359 U.S. at 138 (noting difficulty in applying state dual sovereignty limitation statutes).[6]

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[6] For a state by state breakdown, including how the Model Penal Code addresses these issues, see Adam Harris Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts (2001); *see also* Carolyn Kelly MacWilliam, Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State*

If dual sovereignty is overruled, *Blockburger's* analytical structure would still remain.[7] *Blockburger's* enduring utility was evident when this Court abandoned a short-lived "same conduct" test and reinstated the *Blockburger* test in *United States v. Dixon*, 509 U.S. 688 (1993)(overruling *Grady v. Corbin*, 495 U.S. 508 (1990)). The *Grady* test was deemed unworkable largely because a conclusive determination often could not be made until well into a second trial—thereby frustrating one of the main objectives of the double jeopardy clause to avoid the inconvenience and harassment of a second trial. *Grady*, 495 U.S. at 529 (Scalia, J., dissenting); *see also Dixon*, 509 U.S. at 703-712 (*Grady* deemed unworkable). Moreover, last term this Court reiterated that it "has emphatically refused to import into criminal double jeopardy law the civil law's more generous 'same transaction' or same criminal 'episode' test." *Currier v. Virginia*, 138 S. Ct. 2144, 2154 (2018)(citing *Garrett v. United States*, 471 U.S. 773, 790 (1985)).

The question then becomes how prosecutions under section 242, the most important federal criminal civil rights statute used to prosecute police brutality, would be affected should dual sovereignty be abolished. Title 18 United States Code, Section 242 provides in relevant part:

Offense Based on Same Facts-Modern View, 97 A.L.R. 5th 201 (2002).

[7] Petitioner agrees. Petitioner's Brief at 9, 51-52. In some circumstances, Congress has statutorily abrogated dual sovereignty. *See, e.g.*, 18 U.S.C. § 659 (theft of interstate shipment statute which provides "[a] judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section *for the same act or acts*"(emphasis added).

> Whoever, under color of law ... willfully subjects any person in any State ... to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States ... shall be imprisoned not more than one year ...and if bodily injury results... shall be imprisoned not more than ten years, ... and if death results... shall be imprisoned for any term of years or for life ... or may be sentenced to death.

First, the Department of Justice's ("DOJ") discretionary Petite Policy would still apply for section 242 prosecutions. The Policy presently recognizes that a federal prosecution following a state prosecution based on substantially the same acts is constitutionally appropriate under the dual sovereignty doctrine. United States Attorneys' Manual ("USAM") § 9-2.031(B). However, the Policy also applies where "a prior prosecution would not legally bar a state or federal prosecution under the double jeopardy clause because each offense requires proof of an element not contained in the other." *Id.* (citing Supreme Court authority). Thus, should dual sovereignty be abolished, the constitutional justification would shift to the above noted second prong of the Policy. As such, the Petite Policy, which was unchanged after a 2017 comprehensive revision of the USAM, would still remain in full force and effect. A successive federal prosecution may be appropriate if the prior state prosecution left a "substantial federal interest ... demonstrably unvindicated." *Id.* § 9-2.031(A).[8]

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[8] Successive federal prosecutions following state prosecutions for the same or similar conduct are uncommon. DOJ generally does not publically release the relevant Petite Policy statistics. Some studies suggest that the federal government authorizes

Additionally, federal prosecutors generally defer to local authorities in the first instance for prosecution of police brutality cases, which concern local criminal conduct squarely within the general police power of the states. The Federalist No. 45 (James Madison); *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014); *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995). This federal "back stop" policy is consistent with bedrock Federalism principles and sensibly provides local prosecutors "'every opportunity to clean up their own shops.'" Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 539 (1994)(citing discussions with federal prosecutors).

Federal deference to state prosecution can be traced back to 1866, when the first federal criminal civil rights statutes were enacted. *See* Robert Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 52 (1985)(noting United States Attorney Benjamin H. Bristow "instructed federal officers to assume primary criminal jurisdiction only after blacks were denied justice in state courts"). As recently as 2015, Attorney General Eric Holder advocated for

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approximately 150 successive prosecutions a year. Kurland, Successive Criminal Prosecutions, at xiv. An American Bar Association Ad Hoc Task Force on Double Jeopardy Report included otherwise unpublished data provided by DOJ officials that indicated most Petite Policy approvals concern situations where a defendant was convicted in state court but received what DOJ considered a manifestly inadequate sentence. *Id.* at 377-378. That appears to be the case with Petitioner Gamble. *See* Petitioner's Brief at 2-3 (defendant received one year state court sentence and then received federal sentence increasing his incarceration approximately three more years).

more aggressive federal civil rights enforcement but nonetheless reaffirmed DOJ's "backstop" role in police brutality cases. Christian Farias, *Eric Holder Wants to Lower the Bar for Federal Civil Rights Prosecutions: That's Trickier Than it Sounds.*, The New Republic, Feb. 27, 2015, https://newrepublic.com/article/121177/eric-holder-we-might-lower-bar-civil-rights-prosecutions.

B. Section 242 "Same Offense" Analysis

In the aftermath of the Civil War, Congress sought to provide a mechanism to federally prosecute those responsible for racial killings, and adroitly drafted the predecessor statutes to current sections 241 and 242. Congress relied on broad statutory terms protecting civil rights so as to legally differentiate these federal crimes from State crimes based on similar conduct:

> Congress thus sought to authorize the federal courts to punish crimes, such as murder, by broadly defining them as violations of federally enforceable civil rights [based on the statutory elements] in order to avoid the accusation that the federal courts were unconstitutionally supplanting state courts in punishing offenses against the criminal laws of the states.

Kaczorowski, *supra* at 57. This was recognition of what would later become known as the *Blockburger* principle to determine whether two statutes constituted the same offense under the double jeopardy clause. *See also Currier*, 138 S. Ct. at 2153 ("the [federal] courts apply today much the same [*Blockburger*] double jeopardy test they did at the founding").

Reconstruction era federal prosecutors, often faced with the lone option of pursing a federal misdemeanor

civil rights charge, obviously would have preferred a competent, fair, and zealous state murder prosecution. Nothing in the historical record suggests that if a state homicide prosecution involving culpable state actors resulted in an unjust acquittal (not an implausible outcome), pursuit of a misdemeanor civil rights charge would be precluded as a matter of law. If anything, the Reconstruction era record suggests otherwise. As Rep. John Bingham, principal author of the Fourteenth Amendment noted:

> I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath [to support, protect, and defend the Constitution], and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 18 n.104 (1995) (citing sources).

Against the Reconstruction backdrop of Southern backlash and violent resistance, the sobering grisly reality is that white men regularly beat or killed black men with relative impunity and State and local prosecutions often did not take place:

> The Klan effectively paralyzed local government agencies and officers. Many public officers were members of the Klan and participated in these crimes. Consequently, though hundreds of crimes were committed, local officers moved against very few. Even when they wanted to bring criminals to justice, local

> officers were too frightened and/or unable to do so.

Kaczorowski, Politics of Judicial Interpretation, at 55; *see also* Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 119-123 (1st Perennial Lib. ed. 1989)(chronicling daily violence against blacks "that raged almost unchecked in large parts of the postwar South"). As one Reconstruction era Florida sheriff lamented, "[i]f a white man kills a colored man in any of the counties of this state ... you cannot convict him." Foner, at 435. More than a century later, the situation remained abysmal in much of the South. "As [Klan] victims became all too well aware, in such bastions of segregation as Alabama it was simply 'not a punishable crime to kill a Negro or civil rights worker.'"[9]

If dual sovereignty is abolished, virtually all federal section 242 "under color of law" prosecutions commenced after prior state court prosecutions based on the same underlying conduct should not constitute the "same offense" under *Blockburger*. 18 U.S.C. § 242 and virtually every State law homicide and aggravated assault statute each contain elements not contained in the other.[10] The critical focus is on

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[9] Michal R. Belknap, *The Vindication of Burke Marshall, The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 Emory L.J. 93 & n.1 (1984)(referencing J. Minnis, Life with Lyndon Johnson in the Great Society (May 20, 1965)(original source citations to document in SNCC papers at Martin Luther King, Jr. Center).

[10] 18 U.S.C. § 242 contains the elements of "under color of law" and deprivation of a constitutional right (usually drafted in section 242 indictments as deprivations of the right to a trial or the right to be free from unreasonable force). On the other hand, state homicide statutes, including Model Penal Code based statutes, contain the element of killing a human being, and

the elements, not the particular manner in how the case was proved. *See Dixon*, 509 U.S. at 700-704; *see also Currier*, 138 S. Ct. at 2153 ("[t]o prevent a second trial on a new charge, the defendant must show an identity of statutory elements between the two charges against him; it's not enough that 'a substantial overlap [exists] in the *proof* offered to establish the crimes'") (citing *Iannelli v. United States*, 420 U.S. 770, 785, n.17 (1975)(emphasis added). Thus, a subsequent section 242 prosecution should likely satisfy *Blockburger* and the federal prosecution should proceed.

Additionally, in *Schmuck v. United States*, 489 U.S. 705 (1989), this Court, although not mentioning *Blockburger* by name, again relied on *Blockburger* principles to determine what constitutes a lesser included offense by focusing on the elements of the statutes, as opposed to relying on an amorphous "inherent relationship approach." *Id.* at 716-717.[11] Consequently,

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assault statutes require proof of the commission of an assault. *See* Appendix 4a-5a (setting forth representative statutes). Thus, *Blockburger* is satisfied even without consideration of jurisdictional or mens rea requirements. Federal courts are split on whether jurisdictional elements can be used to satisfy *Blockburger*. *See United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995)(jurisdictional elements may be used to satisfy *Blockburger*); *United States v. Salad*, 907 F. Supp. 2d 743, 748-750 (E.D. Va. 2012)(surveying circuit split). The status of mens rea elements is also unclear. *See Dixon*, 509 U.S. at 701 (suggesting specific intent to kill element can be used in *Blockburger* analysis).

[11] The *Schmuck* Court held:

> Since offenses are statutorily defined, that comparison is appropriately conducted by reference to the statutory elements of the offenses in question, and not, as the inherent relationship approach would mandate,

there is no basis to modify the *Blockburger* test in the event dual sovereignty is overruled.

Nonetheless, if dual sovereignty is abolished, a new level of cooperative federalism may be necessary if the federal government still chooses to pursue the sensible policy of federal deference in many police brutality cases. Federal prosecutors may have to walk a legal tightrope so as to avoid a claim that a purported increase in the level of interjurisdictional coordination establishes that a second prosecution is a sham.

For example, some state criminal civil rights charges which closely parrot section 242 should, out of an abundance of caution, not be brought. *See, e.g.*, Cal. Penal Code §§ 149 (misdemeanor for public officer, acting under color of authority, to unlawfully use excessive force); 422.6 (misdemeanor to injure or threaten person exercising constitutional right, whether or not acting under color of law); *see also* Model Penal Code § 243.1 ("Official Oppression" misdemeanor statute).[12] These are rarely prosecuted misdemeanors, and state prosecutors could easily adopt review procedures that would largely avoid these charges altogether. *See* Levenson, at 553 (noting California civil rights misdemeanor statutes are rarely, if ever, utilized). More problematic could be inclusion of less serious related state charges, including lesser included offenses, for the purpose of increasing the likelihood of a conviction on *some* charge even if the jury cannot reach a verdict on the more serious charges. This scenario could conceivably bar a subse-

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by reference to conduct proved at trial regardless of the statutory definitions.

Schmuck, 489 U.S. at 716-717.

[12] These statutes are set forth at Appendix 4a-5a.

quent federal civil rights prosecution if some lesser offense resulting in a conviction or acquittal is later determined to constitute the "same offense" as section 242.

Federal conspiracy prosecutions for violations of 18 U.S.C. § 241, another vitally important federal criminal civil rights statute often undertaken after a state prosecution, would likely be largely unaffected by the abolition of dual sovereignty. Section 241 reaches conspiracies involving acts under color of law and can also reach certain wholly private conspiracies as well.[13] The double jeopardy clause does not apply where there are two separate convictions for an underlying substantive crime and a conspiracy to commit that same crime. *United States v. Felix*, 503 U.S. 378 (1992). Similarly, separate conspiracy convictions that concern overlapping but legally distinct conduct do not violate the double jeopardy clause. *Albernaz v. United States*, 450 U.S. 333 (1981). The resolution of this case should not affect those precedents.

C. The Issue Preclusion Component of Double Jeopardy Does Not Apply to Successive Inter-Sovereign Prosecutions

The briefs filed at the petition for certiorari stage focused exclusively on the constitutional legitimacy of dual sovereignty. The issue preclusion (or "collateral estoppel") component of double jeopardy as reflected in *Ashe v. Swenson*, 397 U.S. 436 (1970), was not addressed in Petitioner's Brief or in any of the

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[13] The relevant portions of section 241 are set forth at Appendix 1a.

principal or amicus briefs previously filed at the petition for certiorari phase.[14]

The abolishment of dual sovereignty would necessitate the almost immediate determination that *Ashe's* issue preclusion principles are inapplicable to inter-sovereign prosecutions. Under *Ashe*, the issue preclusion component of double jeopardy applies when an issue was necessarily resolved in the defendant's favor in the first trial and is sought to be used against the *same* sovereign who lost the first trial. The *Ashe* Court held that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit." *Id.* at 443 (emphasis added).

If this Court does not ultimately overrule *Ashe* in its entirety,[15] *Ashe* should remain as is, and not be extended to bar "relitigation" of an issue purportedly necessarily resolved in the defendant's favor in a prior state court trial. Collateral estoppel cannot be used as a sword to bind a non-party to the prior litigation–in this case the federal government in a subsequent prosecution who had no opportunity to litigate the issue in a prior state trial. Binding the federal government as a non-party is inappropriate because

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[14] In the aftermath of the Rodney King trials, one commentator noted that "there has been surprisingly little exploration of the implications of the constitutionally based collateral estoppel doctrine recognized in *Ashe*." Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 645 (1994).

[15] Last term, a plurality of this Court suggested that *Ashe* was an awkward fit in criminal cases, and that collateral estoppel should have no place in double jeopardy jurisprudence. *Currier v. Virginia*, 138 S. Ct. at 2150-2156 (Gorscuch, J.,)(plurality opinion).

"[i]n a criminal case, the government is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." *Standefer v. United States*, 447 U.S. 10, 22 (1980). This Court recently warned "that issue preclusion principles should have only 'guarded application ... in criminal cases.'" *Currier*, 138 S. Ct. at 2152 (citing *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016)).

If dual sovereignty is abolished, *Ashe* should not be extended to apply to inter-sovereign successive prosecutions. The federal government is not a party to any prior state trial. In the civil rights context, extending *Ashe* could effectively bar the federal government from establishing the requisite willful misconduct in a successive federal trial where the defendant was acquitted in a prior state court homicide, reckless endangerment, or assault prosecution. Although the outcome would be far from certain, the defendant could claim that the acquittal was based on a determination that the defendant officer's conduct striking or killing the victim was lawful. In some circumstances, this could effectively bar a subsequent federal trial altogether even if the federal prosecution involved a statute that did not otherwise constitute the "same offense" as the prior state charge.

Standefer supports rejection of this extension of collateral estoppel. *Standefer*, 447 U.S. at 23 ("[u]nder contemporary principles of collateral estoppel [the prosecution's inability to appeal an erroneous acquittal] strongly militates against giving an acquittal preclusive effect"). Extending *Ashe* to permit sword-like use against non-party federal prosecutors in a subsequent trial would severely weaken federal criminal civil rights enforcement of police brutality cases, and derail sensible long standing DOJ policies favoring initial

deference to state prosecution. *See Standefer*, 447 U.S. at 25 (emphasizing importance of judicial interpretive doctrines that vindicate the public interest in the enforcement of the criminal law, and cautioning against application of an estoppel rule "that would spread the effect of an erroneous acquittal").

Lastly, and most fundamentally, the State and federal government are not the *same* parties, nor are they remotely the functional criminal law equivalent of parties in privity.[16] Quotation marks notwithstanding, even Justice Black's preeminent critique of dual sovereignty acknowledges that inter-sovereign prosecutions are being undertaken by different parties:

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a

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[16] *Compare* Fed. R. Evid. 804(b)(1), which limits the use of prior statements in criminal cases to situations where the *same* party had opportunity and similar motive to previously question the witness, but permitting admission of such statements in civil cases on a more lenient basis where the same party *or predecessor in interest* had opportunity and similar motive to examine the witness. It would be illogical to interpret the collateral estoppel component of double jeopardy more harshly against the government than the manner by which the Federal Rules of Evidence regulate the admission of evidence against the government. *But cf.* Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 334-335 (1963)(suggesting state and federal government are in privity when each prosecution concerns the same interest). For cases expressly rejecting criminal collateral estoppel to non-parties, see *Martin v. Rose*, 481 F.2d 658, 660 (6th Cir. 1973)("since ... successive federal and state prosecutions do not involve the same parties or their privies" collateral estoppel cannot apply); *State v. Rogers*, 566 P.2d 1142, 1145 (N.M. 1977)(same).

> State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. *If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials than when one of these "Sovereigns" proceeds alone.* In each case, inescapably, a man is forced to face danger twice for the same conduct.

Bartkus, 359 U.S. at 155 (Black, J., dissenting) (emphasis added).

Abolishing dual sovereignty provides no basis to further abrogate traditional collateral estoppel principles. In order to avoid the unnecessary devolution of police misconduct prosecutions into an unseemly "race to the courthouse"[17] and to maintain important and sensible discretionary DOJ policy preferences to defer to state prosecution in the first instance, the traditional collateral estoppel principle that non-parties cannot be bound should be maintained as sound constitutional doctrine.[18]

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[17] *See Heath v. Alabama*, 474 U.S. 82, 93 (1985)(criticizing interjurisdictional "race to the courthouse" as unsatisfactory method of prosecutorial decision making).

[18] This could be particularly problematic for federal civil rights prosecutions, which, at present, often rely on significant federal-state coordination and cooperation. Even under the current dual sovereignty regime, interjurisdictional tensions concerning the order of prosecution sometimes become public spectacles, pitting vital state interests concerning enforcing state homicide laws against the federal government's vital interests in enforcing federal criminal civil rights laws. *See* Andrew Knapp, *Wilson:*

II. CONSTITUTIONAL DOCTRINE SUPPORTS AN INDEPENDENT CIVIL RIGHTS EXCEPTION TO DOUBLE JEOPARDY

As noted above, if dual sovereignty is abolished, most successive section 242 police brutality prosecutions would not constitute a prosecution for the "same offense" in relation to offenses based on the same or similar conduct previously tried to verdict in state court. However, the abolishment of dual sovereignty will likely create some uncertainty concerning the ability to prosecute other federal criminal civil rights statutes after a state prosecution covering similar conduct.[19]

Feds ignoring S.C. Roof case Solicitor frustrated over scheduling conflicts, idea of families enduring trial during holidays, The (Charleston) Post & Courier, June 19, 2016, https://www.postandcourier.com/archives/wilson-feds-ignoring-s-c-roof-case-solicitor-frustrated-over/article_9eb4911e-fe10-5d68-9771-228e4dcc2fe6.html (highlighting state court hearing that exposed state prosecutor's frustration concerning whether Roof should be prosecuted first by federal or South Carolina authorities); *see also* Doug Stanglin, *Driver accused of plowing into crowd at Charlottesville rally charged with federal hate crimes*, USA Today, June 27, 2018, https://www.usatoday.com/story/news/2018/06/27/charlottesville-rally-james-alex-fields-charged-federal-hate-crimes/738514002 (noting federal hate crimes indictment in Charlottesville incident, further noting defendant already facing state trial commencing in November, 2018 on first degree murder and related charges). This inter-sovereign friction likely would increase if dual sovereignty is abolished, where, for some crimes determined to constitute the "same offense," a race to the courthouse could replace more measured federal-state coordination and cooperation to determine the sole jurisdiction that should prosecute the defendant concerning the incident.

[19] For example, some federal hate crimes prosecutions could be vulnerable as a prosecution for the "same offense" under

The concept of a constitutional civil rights exception derives from the inherent necessity to "consult not only the Founding vision articulated in the original Bill of Rights, but also the Reconstruction vision enacted in the Fourteenth Amendment." Amar & Marcus, at 19 n.108. Should dual sovereignty be abolished, this Court should recognize—or, at minimum, not foreclose— a limited civil rights "exception," the parameters of which would necessarily be defined in future litigation.

"[T]he constitution [is not] a suicide pact," *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949)(Jackson, J., dissenting)(warning that "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact"), and the federal government's solemn constitutional obligation to vigorously enforce the federal civil rights laws must factor into the Court's constitutional decision making. Professors Amar and Marcus observe:

> Section 5 [of the Fourteenth Amendment] was paradigmatically about federal criminal law enforcement of Section 1. ... Congress designed Section 5 to support the Civil Rights Bill of 1866, which included a key criminal provision at abusive state officials (and only state officials). In light of this clear history, it would be highly ironic if federal criminal prosecution of abusive state officials under the Act of 1866 could be blocked by –of all things—the Fourteenth Amendment itself.

Blockburger if a federal prosecution sought to follow a prior state homicide prosecution based on the same underlying acts.

* * *

> Thus, where the federal government is exercising its power pursuant to Section 5 to prosecute tyrannical state officials, as in the prosecution of the Los Angeles police officers, the dual sovereignty doctrine retains validity: it makes structural sense even after the Fourteenth Amendment is added to the original Bill of Rights and *Barron* is generally repudiated.
>
> * * *
>
> In sum, the dual sovereignty doctrine, while rendered largely obsolete by the Fourteenth Amendment, still has a narrow but crucial role to play in enforcing the Reconstruction values of that same amendment against state officials.

Amar & Marcus, at 17-19. Other prominent federal criminal law scholars further note that "because the Fourteenth Amendment was adopted after the Fifth Amendment's Double Jeopardy Clause and Equal Protection Clause, the Congressional enforcement authority under that Amendment might be understood to create an exception to double jeopardy." Norman Abrams, Sara Sun Beale, Susan Riva Klein, Federal Criminal Law and its Enforcement 117 (6th ed. 2015). In determining constitutional issues concerning the consequent evolution of federal and state sovereignty, this Court has often recognized the "tacit postulates" of federalism "necessary to make the Constitution a workable governing charter ... [which] are as much engrained in the fabric of the document as its express provisions, because, without them, the Constitution is denied force, and often meaning." *Nevada v. Hall*, 440

U.S. 410, 433 (1979)(Rehnquist, J., dissenting)(citing examples).

As noted above, future litigation will be necessary to define the contours of this doctrine. *See, e.g.*, Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649, 670-71 (1994)(endorsing civil rights exception based on "constitutional authority possessed by Congress to implement guarantees of [*all three*] Civil War amendments")(emphasis added). The doctrinal development will be challenging.

For example, Chapter 13 of Title 18 of the United States Code is entitled "Civil Rights." However, several of the statutes in that chapter do not require state action and were not enacted solely pursuant to Congress' section 5 enforcement powers.[20]

Apart from section 242, which requires state action and is unambiguously based on section five of the Fourteenth Amendment,[21] other important federal criminal civil rights statutes concern conduct that could constitute the "same offense" as some state homicide, assault, or arson statutes, but lack pure Fourteenth Amendment, section five constitutional pedigrees. For example, the most recent "Matthew Shepard Act" amendments to 18 U.S.C. § 249(a)(2) are based on the commerce clause. *See* 18 U.S.C.

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[20] Additionally, some criminal civil rights statutes are not even found in Title 18, chapter 13. *See, e.g.*, 42 U.S.C. § 3631 (interference with housing rights).

[21] *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). In *United States v. Morrison*, 529 U.S. 598 (2000), this Court held that Congress' purported reliance on section five of the Fourteenth Amendment does not provide talismanic unreviewable constitutional justification. *Id.* at 619-627.

§ 249(B)(i)(I)(II)(proscribed conduct must cross a state line or use a channel, facility, or instrumentality of interstate or foreign commerce). As such, depending on the scope of any recognized civil rights exception, the federal government's ability to prosecute some important civil rights cases could be significantly impeded. Other potentially vulnerable statutes which cover conduct often prosecuted by state authorities include 18 U.S.C. § 245 (based, in part, on commerce clause), § 247(a)(b)(damage to religious property statute based on commerce clause), § 248 (congressional statement of purpose that FACE statute enacted pursuant to both commerce clause, U.S. Const. art. I, § 8, cl. 3, and section five, 14th amendment), 42 U.S.C. § 3631 (1988 amendments to anti-housing discrimination law extended statutory coverage to disabled persons based on commerce clause).[22] However, the potential difficulties in defining the ultimate parameters of the exception do not reduce the vital importance of constitutional recognition of the exception.[23]

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[22] *See* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 Ala. L. Rev. 203, 234-239 (2006)(convoluted congressional intent reflecting original 1968 enactment relied on both section five of Fourteenth Amendment and commerce clause (citing sources). For the relevant statutory language of the above listed statutes, see Appendix 1a-2a.

[23] It is worth noting that this Court upheld the constitutionality of the Civil Rights Act of 1964 as a proper exercise of congressional authority under the commerce clause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-262 (1964). For a comprehensive history regarding the struggle to pass the 1964 Civil Rights Act, see Clay Risen, The Bill of the Century: The Epic Battle for the Civil Rights Act (2014).

CONCLUSION

Federal criminal civil rights enforcement was born in the immediate aftermath of the Civil War. Since then, the federal government and the States have possessed concurrent civil rights enforcement authority, and the federal government has often wisely deferred to state prosecution in the first instance. The federal criminal civil rights laws proscribing misconduct undertaken "under color of law" do not preempt state criminal laws, and were constitutionally designed to supplement state law enforcement. Section 242 was originally a misdemeanor, and remained so for more than a century. Thus, preference for a vigorous state felony prosecution was explicable. Even today, long after section 242 was elevated to felony status, DOJ still generally prefers initial federal deference to state law enforcement in local police misconduct cases.

If the dual sovereignty doctrine is abolished, most section 242 law enforcement misconduct prosecutions would survive a *Blockburger* analysis. Nevertheless, the abolishment of dual sovereignty would inevitably require reevaluation of much of the complex tapestry of double jeopardy jurisprudence woven during the nearly two century dual sovereignty era. Most notably, the collateral estoppel component of double jeopardy—if not ultimately overruled in its entirety as suggested by the *Currier v. Virginia* plurality—should continue to embody the traditional requirement that non-parties to the first action are not bound in subsequent litigation where they are parties. A contrary decision could substantially erode the fair and effective enforcement of the federal criminal civil rights laws. Resolution of the dual sovereignty issue need not constitutionally undermine federal criminal civil rights enforcement to such a significant degree.

Next, even if many federal criminal civil rights prosecutions survive a *Blockburger* analysis, abolishing dual sovereignty could undermine DOJ's long held policy to defer many civil rights prosecutions to state authorities in the first instance. This would almost certainly increase interjurisdictional tensions and result in prosecutorial races to the courthouse as well as other injudicious procedural jockeying in order to obtain charge selection advantage.

Lastly, if the dual sovereignty doctrine is abolished, this Court will face future litigation to determine the existence and contours of a civil rights "exception" to the double jeopardy clause. The Fourteenth Amendment provides the foundation for the federal government's solemn constitutional and moral obligation to protect civil rights and to effectively enforce the federal criminal civil rights laws. It would be lamentably ironic if this Court interprets the Fourteenth Amendment, the vehicle by which the double jeopardy clause applies to the States, in a manner that unnecessarily erodes the federal government's solemn civil rights enforcement obligations which arise from the Fourteenth Amendment itself.

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APPENDIX

APPENDIX

FEDERAL MATERIALS

Pub. L. 103-259, 108 Stat. 694, May 26, 1994

SECTION 1. SHORT TITLE

This Act may be cited as the "Freedom of Access to Clinic Entrances Act of 1994 [18 U.S.C. § 248]".

SEC. 2. PURPOSE

Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

18 U.S.C. § 241, Conspiracy against rights, provides in relevant part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . [t]hey shall be fined under this title or imprisoned not more than ten years, or both, and if death results from the acts committed . . . shall be . . . imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 245, Federally protected activities, provides in relevant part:

(b) Whoever, whether or not acting color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate with –

* * *

(2) any person because of his race, color, religion, or national origin and because he is or has been –

* * *

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air.

18 U.S.C. § 247, Damage to religious property; obstruction of persons in the free exercise of religious beliefs, provides in relevant part:

(b) The circumstances referred to in subsection (a) [setting forth the elements of the offense] are that the offense is in or affects interstate or foreign commerce.

42 U.S.C. § 3631, Fair Housing, Prevention of Intimidation, provides in relevant part:

Whoever, whether or not acting under color of law, by force or threat of force willfully injuries, intimidates or interferes with, or attempts to injure, intimidate or interfere with – [and unlawfully discriminates or harasses persons because of race, color, religion, sex, handicap, . . . family status, or national origin, while they either occupy housing or are contracting to occupy housing] . . . (c) shall be fined . . . or imprisoned [pursuant to law].

Federal Rule of Evidence 804(b)(1)

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or other lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had–or, in a civil case, whose predecessor in interest had–an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

United States Attorneys Manual § 9-2.031 – (Dual and Successive Prosecution Policy ("Petite Policy") provides in relevant part:

A. This policy establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding.

* * *

The policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless [three] prerequisites are satisfied . . . the matter must involve a substantial federal interest [and] . . . the prior prosecution must have left that interest demonstrably unvindicated.

> B. The policy . . . constitutes an exercise of the Department's prosecutorial discretion, and applies even where a prior state prosecution would not legally bar a subsequent federal prosecution under the Double Jeopardy Clause because of the doctrine of dual sovereignty, or a prior prosecution would not legally bar a subsequent state or federal prosecution under the Double Jeopardy Clause because each offense requires proof of an element not contained in the other (citations omitted).

OTHER MATERIALS

California Penal Code § 149 provides:

> Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment.

California Penal Code § 187 provides in relevant part:

> (a) Murder is the unlawful killing of a human being, with malice aforethought.

California Penal Code § 422.6 provides in relevant par

> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in

whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

* * *

(c) Any person convicted of violating subdivision (a) . . . shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed $5000, or by both . . . .

Model Penal Code Provisions

Section 210.1. Criminal Homicide

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide.

Section 211.2 Recklessly Endangering Another Person

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another in danger of death or serious bodily injury. . . .

Section 243.1 Official Oppression

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(1) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or

(2) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.

No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF AMICI CURIAE

Amici curiae are law professors who have studied the history of the dual sovereignty doctrine. The purpose of this brief is to provide the Court with additional historical information that will be useful in reconsidering dual sovereignty.[1]

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SUMMARY OF ARGUMENT

Petitioner's brief demonstrates that there was no dual sovereignty doctrine before the mid-19th century. At the Founding and for several decades thereafter, a prosecution by one sovereign was understood to bar a subsequent prosecution by all other sovereigns. Dual sovereignty is thus contrary to the original meaning of the Double Jeopardy Clause. Defendants today enjoy a weaker form of double jeopardy protection than they did when the Bill of Rights was ratified.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

But that fact only raises three further questions. First why did the Court erroneously conclude in *Bartkus v. Illinois*, 359 U.S. 121, 131 (1959), that the English and early American sources are "totally inconclusive" as to whether dual sovereignty existed at the Founding? Second, how, when, and why did the dual sovereignty doctrine come to exist? Third, given this history, why did the Court hold in *United States v. Lanza*, 260 U.S. 377 (1922), that a state prosecution does not bar a subsequent federal prosecution for the same conduct? This brief will answer these questions.

First, in *Bartkus* the Court simply misunderstood the English and early American sources.

Second, dual sovereignty grew out of the intense controversy over slavery in the period immediately before the Civil War. The Court invented dual sovereignty largely to prevent free states from blocking the recapture of fugitive slaves.

Third, by the time of *Lanza*, the dual sovereignty doctrine had been restated so often that the original meaning of the Double Jeopardy Clause had been forgotten. In *Lanza*, in any event, the Court was less concerned with original meaning than with rampant disregard for Prohibition. One purpose of dual sovereignty was to prevent "wet" localities from nullifying the Volstead Act.

In short, dual sovereignty is an accident of history. It was not part of the constitutional design.

ARGUMENT

Dual sovereignty is an accident of history; it was not part of the constitutional design.

A. In *Bartkus v. Illinois*, the Court misunderstood the English and early American sources relevant to the origin of dual sovereignty.

The Court has examined the early sources relevant to the origin of dual sovereignty on only one occasion. In *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Court devoted two paragraphs to the early sources, and concluded that the historical record is "totally inconclusive" as to whether dual sovereignty existed at the Founding. *Id.* at 131. This conclusion is mistaken. It rests on two major errors.

First, the Court refused even to consider the English cases, *R. v. Roche*, 168 Eng. Rep. 169 (Cr. Cas. 1775), and *R. v. Hutchinson* (1678) (which is described in *Roche*, 168 Eng. Rep. at 169 n.a, and in several other cases). The Court simply ignored *Roche*. As for the cases describing *Hutchinson*, the Court asserted that they are "dubious"—in part because they exist in different reported versions, and in part because "they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus*, 359 U.S. at 128 n.9.

Neither of these claims stands up to scrutiny. *Roche* exists in only one reported version. *Hutchinson* is indeed described slightly differently by different reporters, but every version says that a prosecution by one sovereign bars a subsequent prosecution by another. *See Beak v. Thyrwhit*, 87

Eng. Rep. 124, 125 (K.B. 1688); *Beak v. Tyrrell*, 89 Eng. Rep. 411, 411 (K.B. 1688); *Beake v. Tirrell*, 90 Eng. Rep. 379, 380 (K.B. 1688); *Burrows v. Jemino*, 93 Eng. Rep. 815, 815 (K.B. 1727); *Burroughs v. Jamineau*, 25 Eng. Rep. 235, 236 (Ch. 1727).

And the cases do not reflect any discretion vested in English judges. They state a clear rule of law barring a subsequent prosecution. Had the Court been able to consider the English treatises along with the cases, the Court would have learned that the rule declared in the cases was repeated uniformly by commentators. *See* John Strange, *A Collection of Select Cases Relating to Evidence* 145 (1754); Henry Bathurst, *The Theory of Evidence* 39 (1761); 2 Timothy Cunningham, *The Merchant's Lawyer* 113 (1768); Francis Buller, *An Introduction to the Law Relative to Trials at* Nisi Prius 346 (1768); Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802); 1 Thomas Starkie, *A Treatise on Criminal Pleading* 301 n.h (1814); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816). There was nothing dubious about it.

Second, the *Bartkus* Court misinterpreted *Houston v. Moore*, 18 U.S. 1 (1820). In *Houston*, the Court considered the possibility that a defendant might be tried twice for the same conduct, once by a state court and again by a federal court. The Court concluded that "if the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.* at 31. In *Bartkus*, the Court erroneously concluded that *Houston*'s reaffirmation of the traditional one-prosecution rule was meant to apply only in the unu-

sual circumstance in which a state imposed criminal sanctions for a violation of a federal criminal law, not in the more common circumstance in which a state imposed sanctions for a violation of its own criminal law. *Bartkus*, 359 U.S. at 130 (referring to *Houston*, 18 U.S. at 28). In fact, *Houston* included no such limitation. The Pennsylvania statute at issue in *Houston*, which prohibited desertion from the militia, was worded similarly to the federal statute prohibiting desertion, *Houston*, 18 U.S. at 28, but, as the *Houston* Court correctly understood, Pennsylvania was enforcing one of its own criminal statutes, not the similarly-worded federal statute.

The Court's mistake in *Bartkus* is readily understandable. The purpose of Pennsylvania's desertion statute was to help the federal government punish deserters, at a time when the federal government was still quite weak. To achieve that end, the Pennsylvania statute was "in substance, a re-enactment of the acts of Congress, as to the description of the offence." *Id.* *Houston* accordingly explained that the purpose of the Pennsylvania statute was "to confer authority upon a State Court Martial to enforce the laws of the United States against delinquent militia men." *Id.* But by using the phrase "to enforce the laws of the United States," the *Houston* Court did not literally mean that Pennsylvania was enforcing a federal statute. Rather, the Court meant that Pennsylvania had added its enforcement efforts to those of the federal government, just as would be the case with similarly-worded state and federal statutes today.

Had the *Barkus* Court been able to consult early American treatises, it would have learned that *Hou-*

ston was uniformly understood to mean that a prosecution by one sovereign would bar a subsequent prosecution by a second sovereign. James Kent's *Commentaries on American Law*, first published in 1826, was the leading general treatise in the country. Kent discussed *Houston* at length. He explained that state and federal courts had concurrent jurisdiction in criminal cases, and that "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other." 1 James Kent, *Commentaries on American Law* 374 (1826). In this respect, Kent noted, criminal cases were just like civil cases, in that "the judgment of a state court, in a civil case of concurrent jurisdiction, might be pleaded in bar of an action for the same cause instituted in a circuit court of the United States." *Id.*

Specialized treatises declared the same rule. *See* William Rawle, *A View of the Constitution of the United States of America* 191 (1825); Thomas Sergeant, *Constitutional Law* 278 (2d ed. 1830); Edward D. Mansfield, *The Political Grammar of the United States* 137 (1835); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846); Francis Wharton, *A Treatise on the Law of Homicide in the United States* 283 (1855).

The *Bartkus* Court thus erred in concluding that there was nothing to be learned from a review of the English and early American sources. The Court has not reviewed them since.

B. Dual sovereignty was invented by this Court shortly before the Civil War, largely as a way of preventing free states from blocking the recapture of fugitive slaves.

This Court abandoned the traditional one-prosecution rule shortly before the Civil War, in three cases decided between 1847 and 1852: *Fox v. Ohio*, 46 U.S. 410 (1847), *United States v. Marigold*, 50 U.S. 560 (1850), and *Moore v. Illinois*, 55 U.S. 13 (1852). The primary reason appears to have been the concern that dual sovereignty would allow free states to thwart the recapture of fugitive slaves.

Fox was a state counterfeiting case in which the defendant argued that the federal government's power to punish counterfeiting was exclusive, not concurrent. In support of this argument, the defendant's lawyer posited the absurd consequences that he argued would flow from concurrent state and federal jurisdiction. "[I]f the power be concurrent," he pointed out, "[t]he weight of authority is decidedly in favor of the doctrine, that a conviction in either court is a bar to a prosecution in the other." *Fox*, 46 U.S. at 429. Whichever sovereign went first, the other sovereign would be prevented from prosecuting, which meant that a state could take power away from the federal government by getting to court faster. "Both the legislative and judicial powers of the United States are thus rendered abortive," he argued—the legislative power because Congress's statute could not be enforced, and the judicial power because the federal courts would be sidelined by the state prosecution. *Id.* at 430.

This argument highlighted a potential problem with the traditional rule, which was that it allowed a

state to effectively nullify federal policy by racing to the courthouse and depriving the federal government of its power to prosecute. This would not be a problem in the area of counterfeiting, as there were no states with a policy of favoring counterfeiting or shielding counterfeiters from the federal government. In most areas of criminal law, the federal government likewise had little reason to worry that a state might attempt to subvert federal policy. But there was one very big exception—slavery.

There was already considerable controversy between the North and the South over slavery. Much of the controversy concerned the efforts of northern states to protect runaway slaves from being captured and returned to slavery. Timothy S. Huebner, *Liberty & Union: The Civil War Era and American Constitutionalism* 59-61 (2016). The federal Fugitive Slave Act of 1793 made it a criminal offense to obstruct the capture of a fugitive slave, 1 Stat. 302, 305 (1793), but some northern states, including Pennsylvania, enacted statutes prohibiting the capture of fugitive slaves, in a deliberate effort to nullify the effect of the Fugitive Slave Act. In *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), the Court put an end to this nullification strategy, by holding that the Fugitive Slave Act preempted Pennsylvania's statute. Abolitionists needed an alternative strategy.

The parade of horribles imagined by Fox's counsel, soon after *Prigg*, was almost certainly a thinly-veiled reference to slavery. If a state prosecution barred a subsequent federal prosecution, a state wishing to protect fugitive slaves had an obvious alternative to the kind of statute *Prigg* had rendered off-limits. Instead of prohibiting the *capture* of fugitive slaves,

the state could prohibit the *harboring* of fugitive slaves. If the penalty was slight, or if the defendant could expect to be pardoned by the state governor, abolitionists harboring fugitive slaves would willingly surrender to state authorities. Once they were "prosecuted" in state court, they would be immunized from federal prosecution. The federal Fugitive Slave Act would be rendered toothless.

In *Fox* the Court thus expressed its first doubts about the traditional one-prosecution rule. "It is almost certain," the Court noted, "that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Fox*, 46 U.S. at 435. The Court was suggesting that the one-prosecution rule was a matter of government grace rather than a strict rule of law, and that the rule could be suspended in extreme cases. The Court did not say what those extreme cases would look like, but it was most likely envisioning the circumstances that Fox's lawyer had imagined, cases in which a free state was intentionally subverting the Fugitive Slave Act. "But were a contrary course of policy and action either probable or usual," the Court concluded—i.e., were double prosecutions to become the norm—"this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which

those authorities might ordain and affix to their perpetration." *Id.* That is, regardless of whether double prosecution was likely or unlikely, it was lawful.

Justice McLean defended the traditional one-prosecution rule in a lengthy dissent. "[T]o punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments," he insisted. "There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence." *Id.* at 439 (McLean, J., dissenting).

The Court took its second step toward dual sovereignty two years later, in *United States v. Marigold*. *Marigold* was the inverse of *Fox*: the defendant had been convicted of counterfeiting in *federal* court, and he argued that *state* jurisdiction over counterfeiting was exclusive. The Court dispensed with this argument unanimously in a short opinion. Toward the end, the Court characterized *Fox* as having stated that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either." *Marigold*, 50 U.S. at 569.

Moore v. Illinois, the third case, involved a state conviction for harboring a fugitive slave, and was thus exactly the kind of case that raised worries about allowing a state prosecution to bar a subsequent federal prosecution. The defendant was the prominent Illinois abolitionist Richard Eells. (Eells

died while the case was pending; Moore was his executor.) Eells was the president of the Illinois Anti-Slavery Party and the party's candidate for governor in 1846. He lived in Quincy, just a few blocks from the Mississippi River, across which lay the slave state of Missouri. His house was the first stop on the Underground Railroad for slaves escaping from Missouri. Eells was caught trying to hide a slave named Charley, who had swum across the river. He was convicted under state law of harboring a fugitive slave.[2]

The case attracted a great deal of attention, because of the intense controversy surrounding the question of how much power free states possessed to regulate the capture of fugitive slaves. Eells was represented by Salmon Chase, the future Chief Justice. Chase was then a Senator and one of the most well-known abolitionists in the country. He relied on *Prigg* to argue that federal jurisdiction with respect to fugitive slaves was exclusive, on the theory that if states lacked the power to *impede* the return of fugitive slaves to their owners, states should also lack the power to *promote* the return of fugitive slaves by prosecuting those who helped the slaves escape. *Moore*, 55 U.S. at 14-15.

As part of Chase's argument that only the federal government had the power to punish the harboring of fugitive slaves, he contended that federal jurisdiction had to be exclusive, or else a person might be unconstitutionally punished twice for the same offense. *Id.* at 19. But the issue of fugitive slaves pre-

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[2] National Park Service, *Dr. Richard Eells House*, https://www.nps.gov/nr/travel/underground/il3.htm.

sented the worst possible context for invoking the traditional one-prosecution rule. The difficulty with the rule was that it could empower a state to nullify federal policy by beating the federal government to the courthouse, and slavery was the one area in which states clearly *would* make that attempt if they could.[3]

The Court thus had an especially pressing policy reason in *Moore v. Illinois* to reject Chase's invocation of the one-prosecution rule. The Court addressed the issue at length. "An offence, in its legal signification, means the transgression of a law," the Court began.

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly

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[3] The recently-enacted Fugitive Slave Act of 1850, like its 1793 predecessor, made it a federal crime to obstruct the recapture of a fugitive slave, 9 Stat. 462, 464 (1850), so it did not change anyone's incentive in this respect.

> averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.

Id. at 19-20. In this passage, the Court made clear that northern states could not nullify the Fugitive Slave Act by conducting sham prosecutions of their own. To do so, however, the Court had to elaborate a dual sovereignty doctrine that was exactly the opposite of the way the Double Jeopardy Clause had been understood since the Founding.

C. In *United States v. Lanza*, the Court was concerned less with the original meaning of the Double Jeopardy Clause than with rampant disregard of Prohibition.

In subsequent years, when the issue arose, the Court did not discuss or cite *Houston* or *Furlong*, its pair of 1820 cases stating that a prosecution by one sovereign would bar a subsequent prosecution by all others. *See Houston*, 18 U.S. at 31; *United States v. Furlong*, 18 U.S. 184, 197 (1820) ("there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State."). The Court merely cited its 1847-52 trilogy of *Fox*, *Marigold*, and *Moore*, and subsequent cases that rested on them. *See Ex parte Siebold*, 100 U.S. 371, 390 (1879) (citing *Fox*, *Marigold*, and *Moore*); *Cross v. North Carolina*, 132 U.S. 131, 139 (1889) (citing *Fox*, *Marigold*, and *Moore*); *Pettibone v. United States*, 148 U.S. 197, 209 (1893) (citing *Cross*);

Crossley v. California, 168 U.S. 640, 641 (1898) (citing *Cross*); *Southern Ry. Co. v. R.R. Comm'n*, 236 U.S. 439, 445 (1915) (citing *Cross*); *Gilbert v. Minnesota*, 254 U.S. 325, 330 (1920) (citing *Moore*); *McKelvey v. United States*, 260 U.S. 353, 358-59 (1922) (citing *Moore*).

Between *Moore* in 1852 and *Bartkus* in 1959, the Court addressed the issue at length only once. The defendants in *United States v. Lanza*, 260 U.S. 377 (1922) were charged under the then-new Volstead Act, the federal Prohibition statute, with manufacturing and possessing liquor. They had already been convicted of the same offenses in Washington state court, as Washington had a prohibition law of its own. They moved to dismiss the federal indictment on the ground that it was barred by the Double Jeopardy Clause.

When the case reached this Court, the defendants received abysmal representation. Their counsel filed a meandering brief, the argument of which was quite hard to discern, a brief that did not seem to question the dual sovereignty doctrine. *See* Brief for the Defendants in Error, *United States v. Lanza*, 260 U.S. 377 (1922). Even Solicitor General James Beck was stumped. "If I correctly understand the argument of the counsel for the defendant," Beck politely began, "he does not question the power of the Federal Government . . . to punish cumulatively a citizen who by the same act has transgressed both the State laws prohibiting the manufacture or traffic in liquor and the national laws." Reply Brief for Plaintiff in Error at 1, *United States v. Lanza*, 260 U.S. 377 (1922). Beck understood Lanza's counsel to be arguing merely that the intent of Congress in the Volstead Act

was that a liquor manufacturer should not be punished under federal law if he had already been punished under state law. *Id.* This was a very weak contention. "It is enough to say," Beck replied, "that no section of the Volstead law contains, either expressly or by implication, any such release of liability." *Id.* at 1-2. The Court understood Lanza's counsel to be making a different argument: that when states prohibited liquor they were acting under the authority of the Eighteenth Amendment rather than their own inherent police power, and that a state prosecution for manufacturing liquor was therefore tantamount to a federal prosecution. *Lanza*, 260 U.S. at 379-80. This too was a very weak contention, which the Court rejected unanimously. *Id.* at 380-82.

The United States was thus the only party in *Lanza* to make a coherent argument about dual sovereignty. Before even mentioning any of the cases, the government's brief emphasized that a one-prosecution rule would allow a state to nullify national Prohibition. "[I]t is quite obvious that State and Nation may widely and quite naturally differ" in their views of Prohibition, Beck noted. Brief for the United States at 4, *United States v. Lanza*, 260 U.S. 377 (1922). It was common knowledge that different parts of the country had radically different attitudes toward alcohol. In New York, for example, there was massive disregard of Prohibition right from the start. Michael A. Lerner, *Dry Manhattan: Prohibition in New York City* (2007). The potential for nullification was obvious, if a state prosecution barred a subsequent federal prosecution. "The State, taking into consideration the more drastic and far-reaching penalties of the Federal law, might content itself

with imposing small or even nominal fines," the government's brief worried. Brief for the United States at 4. "As the sentiment for the enforcement of prohibition laws is believed to be inactive in some States, especially in some subdivisions thereof, it would follow that the State courts would virtually become in some localities 'cities of refuge' . . . from the effective action of the Federal Government." *Id.* at 5. If bootleggers flocked to New York and other "wet" cities, "[t]he nominal fines of a local magistrate, perhaps only a justice of the peace, might become the bootlegger's 'benefit of clergy.'" *Id.* at 5. The government repeated this concern in its reply brief. "[A]s there is now a wide difference of opinion in various States with respect to the wisdom and justice of prohibition," the government cautioned, "it will follow that, in the States that are called 'wet,' the offender, by submitting to nominal punishments, will escape the rigor of the Federal laws." Reply Brief for Plaintiff in Error at 13.

The Court's opinion in *Lanza* duly noted all the cases establishing dual sovereignty, beginning with the trilogy of 1847-52, *Fox*, *Marigold*, and *Moore*. *Lanza*, 260 U.S. at 382-84. As usual, the Court did not mention any sources before 1847. Lanza's inept counsel had not cited them. (The United States cited *Furlong*, not *Houston*, and erroneously described *Furlong* as involving "questions of discretion, not of power." Brief for the United States at 18-19 (referring to *Furlong* by its informal name, *U.S. v. Pirates*).)

Toward the end of its opinion in *Lanza*, the Court acknowledged the concern about Prohibition enforcement that had been emphasized by the Solicitor

General. "If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines," the Court explained, "the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute." *Lanza*, 260 U.S. at 385. Prohibition, like slavery, was an issue as to which states were certain to nullify federal policy if they were given half a chance. The purpose of dual sovereignty was to cut off that opportunity.

* * *

The lesson from this story is that dual sovereignty was not part of the constitutional design. It is an accident of history. It is a doctrine the Court created during the slavery crisis that led to the Civil War, and one the Court reinforced during Prohibition. In both instances, the Court was responding to the pressing political issues of the day rather than taking the longer view that constitutional interpretation often requires.

The Court's inattention to the early sources has become particularly unfortunate in recent years, as the Court has paid closer attention to the original meaning of the constitutional protections for criminal defendants. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004). Defendants today have weaker double jeopardy protection than they did at the Founding, when the Double Jeopardy Clause was understood to bar successive prosecutions by all sovereigns, not just the sovereign that prosecuted

first. If judges can weaken constitutional protections for policy reasons that seem pressing at the time, one wonders what the Constitution is for.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici's members include a diverse group of state and local governments, active prosecutors, law enforcement personnel, and elected officials, each of whom has an acute interest in ensuring that the long-entrenched dual sovereignty doctrine remains intact. *Amici* and their members rely on their States' sovereign authority to enact criminal laws and to pursue criminal prosecutions that benefit the communities they serve. The dual sovereignty doctrine promotes these efforts.

Eliminating the doctrine, by contrast, would threaten *amici*'s ability to meet local needs. It would hinder state and local cooperation with the federal government and increase competition among law enforcement—a process that is sure to have an outsized impact on state and local officials forced to try to jostle with federal prosecutors for cases. State and local officials remain the face of law enforcement, and they assume the political accountability that comes with that role. In doing so, however, they rely every day on the continued certainty that, through the dual sovereignty doctrine, they can seek to serve their own sovereign interests as best they see fit. The Court should not topple this centuries-old doctrine.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935,

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. The League is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National District Attorneys Association (NDAA) is the largest prosecutor organization repre-

senting 2,500 elected and appointed District Attorneys across the United States as well as 40,000 Assistant District Attorneys. NDAA provides professional guidance and support, serves as a resource and education center, and follows and addresses criminal justice issues of national importance.

The National Sheriffs' Association (NSA) is a 501(c)(4) non-profit association formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States. One of the primary missions of NSA is to promote and protect the Department/Office of Sheriff located throughout the United States. NSA has over 21,000 members and is a strong advocate of America's over 3,080 Sheriffs. Over 99% of all our nation's Departments/Offices of Sheriff are directly elected by the people of their local parish, city and county. NSA promotes the public interest goals and policies of law enforcement in our nation by participating in judicial processes where the vital legal interests of law enforcement and our membership are affected.

INTRODUCTION AND SUMMARY OF ARGUMENT

At its most elemental level, the dual sovereignty doctrine is a recognition of the States' inherent, and equal, sovereignty reserved to them by the Tenth Amendment. Although the States and the federal government are indeed "parts of ONE WHOLE," see *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (quoting THE FEDERALIST NO. 82 (Alexander Hamilton) (J. Hopkins ed., 1802)), it is equally true that "the whole people of the United States asserted their political identity and unity of purpose when they created the federal system," with "two political capacities, one state and one

federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In advocating to eliminate the dual sovereignty doctrine, Petitioner loses sight of the doctrine's Tenth Amendment foundation and fails to recognize the significant benefits from our federal system that will be jeopardized in its absence.

Amici submit this brief to highlight two important points. *First*, Petitioner's brief focuses on the text and history of the Fifth Amendment's Double Jeopardy Clause, while largely failing to account for the dual sovereignty doctrine's Tenth Amendment foundation. This Court's cases make clear, however, that the Tenth Amendment and the federalism principles it enshrines have formed and shaped the doctrine both before and after the Double Jeopardy Clause's incorporation. These roots are critical to ensuring that the doctrine remains true to its primary objectives: the protection of state sovereignty, the enhancement of individual liberty, and the heightening of political accountability.

Second, eliminating the dual sovereignty doctrine would frustrate cooperative federalism and have a lopsided impact on state and local governments. It would directly impair the state and local exercise of prosecutorial discretion, which this Court has routinely safeguarded as fundamental to the federalist system. It would prevent the States from fully securing their citizens' right to liberty from violence, which is at the heart of the liberty secured by federalism. It would also uproot longstanding state efforts to provide *greater* protections against double jeopardy and require that each State cede prosecutorial authority to the federal government. And eliminating the dual sovereignty doctrine would unfairly impact state and

local prosecutors, who would remain politically accountable for law enforcement outcomes, despite being stripped of the ability to address those problems locally.

Put simply, the dual sovereignty doctrine is not a doctrine of convenience: it safeguards the benefits of federalism and ensures that the States retain their primary authority over the administration of criminal justice. The Court should affirm the ruling of the United States Court of Appeals for the Eleventh Circuit and ensure that the dual sovereignty doctrine remains undisturbed.

I. THE DUAL SOVEREIGNTY DOCTRINE'S TENTH AMENDMENT FOUNDATION.

Petitioner focuses heavily on double jeopardy as understood in English history and precedent. But this Court has correctly recognized that those authorities are "dubious . . . because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus* v. *Illinois*, 359 U.S. 121, 128 n.9 (1959). Consideration of the dual sovereignty doctrine instead requires us to look "to the American experience, including our structure of federalism which had no counterpart in England." See *United States* v. *Gillock*, 445 U.S. 360, 369 (1980).

Petitioner fails to do so and, in fact, never once even cites to the Tenth Amendment. That ahistorical account ignores the Framers' intent to reserve primary authority over criminal justice to the States by way of the Tenth Amendment—an intent that has molded the Court's dual sovereignty cases. And protecting state authority over the administration of criminal justice was not an end unto itself but was, instead, designed to make government more responsive and

accountable, and to enhance individual liberties. The dual sovereignty doctrine serves these goals.

A. The Tenth Amendment Historical Record Confirms The States' Primary Sovereignty Over Criminal Justice.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X. The historical record underlying this amendment amply confirms that, where criminal justice is concerned, the power was almost exclusively "reserved to the States" and is a feature of the States' inherent sovereignty.

At the founding, Antifederalists voiced concern at nearly every state ratifying convention that an overly powerful national government would subdue the role of the States in the constitutional design. See generally 1-4 The Debates in the Several State Conventions of the Adoption of the Federal Constitution (Washington, J. Elliot 1827) [hereinafter ELLIOT], *available at* https://bit.ly/2OjNatI; *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting). They understood that the natural inclination of a central government would be "to lessen and ultimately to subvert the State authority." BRUTUS, FEDERALIST POWER WILL ULTIMATELY SUBVERT STATE AUTHORITY, *reprinted in* Antifederalist No. 17, THE ANTIFEDERALIST PAPERS 42, 45 (Morton Borden ed., 1965).

Despite widespread disagreement on the proper scope of federal power, however, there was widespread agreement about one thing: criminal justice was by and large a power reserved to the States. See BRUTUS, CERTAIN POWERS NECESSARY FOR THE COM-

MON DEFENSE, CAN AND SHOULD BE LIMITED (1788), *reprinted in* ANTIFEDERALIST NO. 23, THE ANTIFEDERALIST PAPERS, *supra*, at 57, 59 ("The most important end of government then, is the proper direction of its internal police, and economy; this is the province of the state governments, and it is evident, and is indeed admitted, that these ought to be under their control."); BRUTUS, THE POWER OF THE JUDICIARY (PART 2) (1788), *reprinted in* ANTIFEDERALIST NO. 80, THE ANTIFEDERALIST PAPERS, *supra*, at 226, 226 (raising alarm over the effect of a federal judicial system on "the internal police and mode of distributing justice at present subsisting in the respective states").

Even Alexander Hamilton, one of the most prominent Federalists, saw the States as arbiters of criminal justice. In his view, "[t]here is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice." THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He considered the administration of justice the "great cement of society, which will diffuse itself almost wholly through the channels of the particular governments" and "insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union." *Id.*; see also THE FEDERALIST NO. 45, *supra*, at 292-93 (James Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

The Federalists eventually conceded that in order to secure the votes for ratification, a bill of rights was necessary—including a provision reserving powers to the States. *Garcia*, 469 U.S. at 568 (Powell, J., dissenting). The Tenth Amendment is the result of this important compromise. The amendment does not contain an enumerated list of powers "reserved to the States."

That choice was deliberate. For one thing, enumeration could have wrongly implied that powers not enumerated were thereby ceded to the national government. See Letter from George Lee Tuberville to James Madison (Dec. 11, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 231, 232 (John P. Kaminski et al., eds., 1988) [hereinafter Kaminski], *available at* https://bit.ly/2DfYLeq ("[A]n enumeration of those priviledges which we retained – wou'd have left floating in uncertainty a number of non enumerated contingent powers and priviledges . . . thereby indisputably trenching upon the powers of the states."). For another thing, an enumerated list was viewed as unnecessary due to the plenary powers enjoyed by the States. See, *e.g.*, 2 ELLIOT, *supra*, at 64 ("[I]t would require a volume to describe" the "rights of particular states"); see *Sossamon* v. *Texas*, 563 U.S. 277, 283 (2011) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint. Upon ratification of the Constitution, the States entered the Union with their sovereignty intact." (citation omitted)).

Even when enumerations were attempted, however, they consistently listed criminal justice among the many rights to be reserved to the States. See, *e.g.*, Tench Coxe, *A Freeman* (Essay II), *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS: 1787-88, at 93 (Colleen A. Sheehan & Gary L.

McDowell eds., 1998) ("[t]he states will regulate and administer the criminal law, *exclusively of Congress*, so far as it regards *mala in se*, or real crimes; such as murder, robbery [etc.]. They will also have a certain and large part of the jurisdiction, with respect to *mala prohibita*."); A.B., Hampshire Gazette (Jan. 2, 1788) *reprinted in* 5 KAMINSKI, *supra*, at 596, 599, *available at* https://bit.ly/2ERHSGl ("murther [sic], adultery, theft, robbery, burglary, lying, perjury, [and] defamation" were state concerns); see also Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 483 (2003) ("On numerous occasions, federalists cited criminal law and local law enforcement, as well as the administration of civil justice and state legal systems generally, as exemplars of reserved state powers.").

In recognition of the States' authority in this realm, the first Congress enacted a fairly limited set of federal offenses in the Crimes Act of 1790. This included treason, piracy, and other offenses committed on federal enclaves—crimes which were all understood to be within federal purview. This Court's early precedents also recognized the States' central role over the administration of criminal justice—that "Congress cannot punish felonies generally," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and "the police power . . . unquestionably remains, and ought to remain, with the States." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

The Court's more recent Tenth Amendment jurisprudence has further solidified the understanding that criminal law enforcement is "an area to which States lay claim by right of history and expertise." *United States* v. *Lopez*, 514 U.S. 549, 582 (1995) (Kennedy, J., concurring); *id.* at 584-85 (Thomas, J., concurring) ("The Federal Government has nothing

approaching a police power."); *United States* v. *Morrison*, 529 U.S. 598, 618 n.8 (2000) (the principle is "deeply ingrained in our constitutional history" that "the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States.").

In sum, the Tenth Amendment historical record confirms the Framers' intention to draw clear boundaries between federal and state authority in the administration of criminal justice, with the vast majority of this power being reserved to the States.

B. The Dual Sovereignty Doctrine Arises From The Recognition That States Possess Primary Authority Over Matters Of Criminal Justice.

The Court's dual sovereignty cases before and after incorporation of the Double Jeopardy Clause confirm that the States' authority over criminal prosecutions is "preserved to them by the Tenth Amendment," *United States* v. *Lanza*, 260 U.S. 377, 381-82 (1922), and that the dual sovereignty doctrine operates as a check against the "displace[ment]" of the reserved power of the States. *Bartkus*, 359 U.S. at 137. Incorporation did not affect the States' authority in this realm, which remains an important basis for the doctrine's continued vitality.

1. Pre-Incorporation Decisions Confirm The Doctrine's Tenth Amendment Anchor.

The Court's earliest recognition of the dual sovereignty doctrine arose in *Fox* v. *Ohio*, a case that affirms the inviolability of state authority over criminal prosecutions. 46 U.S. (5 How.) 410 (1847). The defendant was indicted in Ohio state court for passing counterfeit coin. *Id.* at 432. He argued the state court

had no jurisdiction to prosecute for that offense, as Congress was given power to coin money and "provide for the punishment of counterfeiting the securities and current coin of the United States." U.S. CONST., Art. I, § 8, cl. 5-6.

This Court rejected the argument, because "[t]he punishment of a cheat or a misdemeanor practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties." 46 U.S. at 434. This state power was so fundamental, in fact, that not even a former federal prosecution could render the state prosecution invalid. Federal prosecution "would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Id.* at 435.

The dual sovereignty doctrine's Tenth Amendment mooring later became even more explicit. The Court reaffirmed the doctrine in *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 15 (1852), recognizing the States' "original and unsurrendered sovereignty" over criminal prosecution. At length, the Court explained that "[t]he power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the United States. In the exercise of this power, which has been denominated the police power, a State has a right to [enact penal laws]." *Id.* at 18.

In *Lanza*, the Court cited directly to the Tenth Amendment, noting that the States' authority to prosecute derived its force "from power originally be-

longing to the states, preserved to them by the Tenth Amendment." 260 U.S. at 381-82; *Abbate* v. *United States*, 359 U.S. 187, 193 (1959) ("The Court . . . pointed out [in *Lanza*] that the State could constitutionally make Lanza's acts criminal under its original powers reserved by the Tenth Amendment, and the Federal Government could constitutionally prohibit the acts under the Eighteenth Amendment."). And in *Bartkus*, the Court explained that the dual sovereignty doctrine serves as a check on federal power: "[i]t would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." 359 U.S. at 137.

2. Incorporation Did Not Alter This Tenth Amendment Foundation.

In *Benton* v. *Maryland*, the Court incorporated the Double Jeopardy Clause against the States, thereby preventing each individual state from twice prosecuting an individual for the same offence. 395 U.S. 784, 796 (1969). This decision did not impact the dual sovereignty doctrine, nor did it undermine the doctrine's Tenth Amendment foundation, but rather the validity of the conviction was judged "under this Court's interpretations of the Fifth Amendment double jeopardy provision." See *id.* The decision left unimpaired each State's sovereign authority to prosecute—once—for offenses to the State's own laws.

In fact, post-incorporation decisions reaffirmed the doctrine's Tenth Amendment foundation in full-throated terms. In *Heath* v. *Alabama*, the Court concluded that each State is considered a separate sovereign, and the States' "powers to undertake criminal prosecutions derive from separate and independent

sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." 474 U.S. 82, 89 (1985).

Most recently, the Court reaffirmed the vitality of the doctrine in *Puerto Rico* v. *Sanchez Valle*, citing to the Tenth Amendment and explaining that "[p]rior to forming the Union, the States possessed 'separate and independent sources of power and authority,' which they continue to draw upon in enacting and enforcing criminal laws. State prosecutions therefore have their most ancient roots in an 'inherent sovereignty' unconnected to, and indeed pre-existing, the U.S. Congress." 136 S. Ct. at 1871 (quoting *Heath*, 474 U.S. at 89)).

Simply put, given the dual sovereignty doctrine's Tenth Amendment mooring, the Court's incorporation of the Double Jeopardy Clause did not affect the doctrine's continuing vitality.

C. The Dual Sovereignty Doctrine Ensures That States Can Guarantee To Their Citizens The Benefits Of Federalism.

Petitioner argues that the dual sovereignty doctrine "runs afoul of foundational concepts of federalism" by "'obliterating ancient safeguards' of individual liberty." Pet. Br. 29. Not only is that wrong in its own right, but Petitioner's position fails to appreciate that "[f]ederalism has more than one dynamic." *Bond* v. *United States*, 564 U.S. 211, 221 (2011) ("*Bond I*").

"The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.* For this reason, the Court has routinely ensured that the States' reservation of authority over the administration of criminal justice remains more than symbolic. It has done so by inval-

idating federal statutes that encroach on the States' authority over criminal conduct, and by refusing to apply federal statutes in ways that infringe on this authority. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (invalidating federal statute that "foreclose[d] the States from experimenting and exercising their own judgment in an area [criminal justice] to which States lay claim by right of history and expertise."); *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) ("*Bond II*") (applying rule of construction against application of federal statute because "the Constitution's division of responsibility between sovereigns . . . leav[es] the prosecution of purely local crimes to the States.").

This reservation of state authority, however, is not federalism's "exclusive sphere of operation." *Bond I*, 564 U.S. at 221. By committing to the States their reserved sovereignty over the administration of criminal justice, States are able to "secure[] to citizens the liberties that derive from the diffusion of sovereign power." *Id.* And these liberties are diverse. "Federalism secures the freedom of the individual," but it also secures liberties "of a political character" that benefit individuals in their operation. *Id.* For example, "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government "more responsive by putting the States in competition for a mobile citizenry." *Id.* (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)). As Madison recognized, "[a]chievement of these ends . . . was the 'great object' of the Constitution." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484,

1492 (1987) (quoting THE FEDERALIST NO. 10, *supra*, at 80 (James Madison)).

Where criminal justice is concerned, these liberties are best secured by protecting the diffusion of power to state and local governments. Indeed, the Framers believed that "state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government," as the actions of a powerful national government—extending to the citizenry at large—were considered to be more dangerous to liberty than those of a diffuse group of states. *Id.* at 1506.

The States, in turn, have gone a step further by diffusing their own sovereign powers to municipal governments. Although municipalities are not considered independent sovereigns under the dual sovereignty doctrine, many states treat municipalities as separate sovereign entities "for all relevant real-world purposes" by giving them "broad home-rule authority, including the power to enact criminal ordinances and prosecute offenses." *Sanchez Valle*, 136 S. Ct. at 1872; *Reynolds* v. *Sims*, 377 U.S. 533, 580 (1964) ("Local governmental entities are frequently charged with various responsibilities incident to the operation of state government."). As discussed below, this diffusion of power inures to the benefit of those impacted by the criminal justice system, including offenders, victims, and the communities affected by crime.

II. ELIMINATING THE DUAL SOVEREIGNTY DOCTRINE WILL FRUSTRATE COOPERATIVE FEDERALISM AND HAVE AN OUTSIZED IMPACT ON LOCAL GOVERNMENT.

The dual sovereignty doctrine ensures that each State—and, by extension, each municipality—may

exercise the States' inherent sovereignty over the administration of criminal justice. THE FEDERALIST NO. 16, *supra*, at 116 (Alexander Hamilton) (each State must "possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted").

Eliminating the doctrine will interfere with state and local prosecutorial discretion, prevent state efforts to foster liberty through innovation and experimentation, impede state and federal cooperative efforts toward a double jeopardy regime that is *more* protective of individual liberty, and blur the lines between state and federal criminal authority in ways that undermine accountability. Each of these unwelcome repercussions, moreover, would disproportionately impact state and local governments.

A. Eliminating The Dual Sovereignty Doctrine Will Impair State Prosecutorial Discretion.

The dual sovereignty doctrine reserves to each state the ability "independently to determine what shall be an offense against its authority, *and to punish such offenses*." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978) (emphasis added). Prosecutorial discretion is an essential hallmark of that power. Indeed, the Court has "traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system." *Bond II*, 134 S. Ct. at 2092.

Bond is a telling example. Federal prosecutors aggressively pursued an indictment under a chemical weapons statute after complaining that Pennsylvania authorities had "charged Bond with only a minor offense." *Id.* The Court refused to read the federal statute to reach purely local conduct, noting that "the

laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond," and the federal government had "displaced the public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign," not to pursue more serious charges. *Id.* at 2092-93. In narrowly construing the statute, the Court added that permitting the federal prosecutors to usurp the State's authority "would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States." *Id.* at 2093.

Petitioner asks for just such a "dramatic departure" here. Consider just a small tweak to the facts of *Bond*, in the absence of the dual sovereignty doctrine. Had the federal prosecutors opted to pursue less aggressive charges in their zeal to convict, or had they done so before the State case, the effort would not only have "displaced" Pennsylvania's prosecutorial decisions but could also have *pre-empted* those decisions. The dual sovereignty doctrine prevents such encroachments while protecting the constitutional boundaries between federal and state governments. See *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

Bond is not, of course, the only instance in which a federal prosecutor's decision to initiate a successive prosecution has encroached on state prosecutorial decisions "in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). In *Lopez*, for example, Texas officials had initiated gun possession charges against a 12th-grade

student, only to reverse that decision the day after federal prosecutors charged the student under a federal gun possession statute. 514 U.S. at 551. Federal prosecutors' incursion into state prosecutorial decisions like this occurs with some frequency, particularly when the subject or crime is considered high profile. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 40 (1998), https://bit.ly/2CSvao2.

The dual sovereignty doctrine prevents such vertical incursions on prosecutorial discretion from the federal government, but it also prevents horizontal incursions by ensuring that each state's prosecutorial decisions remain independent of those made by a sister state. *Heath*, 474 U.S. at 89 ("The States are no less sovereign with respect to each other than they are with respect to the Federal Government."). In recent years in particular, the Court has emphasized the importance of equal sovereignty among and between the state and federal governments. *E.g.*, *Shelby Cty.* v. *Holder*, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States."); *Franchise Tax Bd. Of Cal.* v. *Hyatt*, 136 S. Ct. 1277, 1282 (2016) (requiring each state to afford a "healthy regard for . . . [the] sovereign status" of sister states).

Eliminating the dual sovereignty doctrine will only exacerbate turf wars among the states and the federal government and thereby lead to a "shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Bartkus*, 359 U.S. at 137.

B. The Dual Sovereignty Doctrine Safeguards The States' Ability To Secure Their Citizens' Liberty From Crime.

Petitioner argues that the dual sovereignty doctrine does not serve federalism's goal of enhancing individual liberty. Pet. Br. 29. However, Petitioner's conception of liberty is unduly cramped and is not aligned with the understanding of the Framers, who recognized that true liberty is to be free from violence. That liberty is best secured by the States who, through "innovation and experimentation" have ensured preferable outcomes for offenders and victims alike. *Bond I*, 564 U.S. at 221. And the dual sovereignty doctrine acts as a final safeguard to the rights of victims by ensuring that one sovereign's institutional failures or lack of political will to address injustice does not constrain another sovereign from doing so.

1. The Framers' conception of liberty was indelibly tied to John Locke's recognition of a social compact, whereby individuals would secure greater liberty through self-government. "[W]here there is no law, there is no freedom. For liberty is to be free from restraint and violence from others." John Locke, *Second Treatise of Government* 86 (Richard H. Cox ed., John Wiley & Sons, Inc. 2014) (1690). This was the basis for James Madison's view that "the first object of government" is to secure the "protection" of "the faculties of men" and, by extension, "the rights of property." THE FEDERALIST NO. 10, *supra*, at 78 (James Madison). As this Court has recognized, the Constitution guarantees freedom from restraint "under conditions essential to the equal enjoyment of the same right by others." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26-27 (1905).

The Framers also understood that this liberty was best secured by the States. The States would retain their sovereign authority over "the ordinary administration of criminal and civil justice" because they were best positioned—they were "the immediate and visible guardian[s] of life and property" and could thus "impress[] upon the minds of the people affection, esteem, and reverence towards the government." THE FEDERALIST NO. 17, *supra*, at 120 (Alexander Hamilton). There would be no true "liberty," and indeed no "reverence towards the government," *id.*, if the States could not ensure that the people were "free from restraint *and violence from others*." Locke, *supra*, at 86 (emphasis added).

2. The States are not only better *positioned* to safeguard liberty; they are better *in practice*, having over the centuries used "innovation and experimentation" to prevent recidivism and protect the victims of crime. *Bond I*, 564 U.S. at 221. Consider, for example, the opioid crisis, which the current administration has made one of its priorities. Rachel Weiner & Sari Horwitz, *Sessions Vows Crackdown on Drug Dealing and Gun Crime*, WASH. POST (Mar. 15, 2017), https://wapo.st/2AmXRI2. In the federal system, a first-time defendant possessing one gram of heroin will face a one-year jail sentence and a minimum $1,000 fine. 21 U.S.C. § 844(a). The same defendant in West Virginia faces only a six month sentence and a maximum $1,000 fine, but may instead proceed through drug court, receive treatment options, and have the charges dismissed. W.V. CODE § 60A-4-401(c) (setting penalties); *Id.* § 62-15-4(g) (permitting court to dismiss charges upon completion of drug court program). The federal system only contains a handful of intervention programs like this, whereas "every state and the District of Columbia have several such court pro-

grams, and some states now have several dozens of them." U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARC-ERATION COURT PROGRAMS 8, 93 (Sept. 2017), https://bit.ly/2ypdyx2.

Preserving the States' ability to administer criminal justice also best serves victims, who have greater rights under many state laws. For example, the State of Arizona has enshrined victims' rights in its constitution, and one of the unique features of the State's regime is the victim's right to refuse an interview, deposition, or other discovery request by the defendant or the defendant's representatives. AZ. CONST. § 2.1(A)(5). No such right exists under the federal Crime Victims' Rights Act. 18 U.S.C. § 3771. In fact, when a state case moves through federal habeas corpus proceedings, the federal statute specifically disclaims any obligation to state crime victims on the part of federal prosecutors. *Id.* § 3771(b)(2)(C) ("This paragraph . . . does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.").

3. The dual sovereignty doctrine further ensures that one sovereign can obtain justice for victims where another sovereign's institutional failures or lack of political will has prevented it from doing so. By dividing power "between two distinct governments, . . . a double security arises to the rights of the people. The governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51, *supra*, at 323 (James Madison). Our nation's history of civil rights prosecutions, and its more recent prosecution of financial crimes, provide apt illustrations of this principle in practice.

When the state of Georgia failed to bring charges against local law enforcement officers for beating an

African-American man to death, the federal government initiated its own prosecution under the Civil Rights Act. See *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring) (plurality opinion). Dual sovereignty ensures that in instances like this of "gross abuse," one sovereign may act as a double security to the rights of the people, without causing "grave or substantial problem of interference by federal authority in state affairs." *Id.* at 133 (Rutledge, J., concurring) (noting the inherent constraints on federal prosecutions under the Civil Rights Act). Absent the dual sovereignty doctrine, however, the officers' three-year sentence under the Civil Rights Act would have precluded the State from prosecuting the officers for the underlying murder, despite the State's primary responsibility for the administration of criminal justice. For this reason, the *Abbate* court—highlighting the *Screws* case specifically—noted that eliminating the dual sovereignty doctrine "would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes." 359 U.S. at 195 (citing *Screws*, 325 U.S. at 109 (plurality opinion)).

The federal government's inability to secure prosecutions following the 2008 economic crisis is another good illustration. There was an "abundance of tangible evidence of wrongdoing by Wall Street bankers, traders and executives in the years leading up to the great unwinding," yet very few prosecutions have resulted, due in large measure to perceived institutional constraints. See William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES (July 21, 2016), https://nyti.ms/2Dcm4U2. The States have, however, held the federal government's feet to

the fire and have also pursued their own prosecutions. For example, when the Obama administration was promoting a $25 billion settlement among five of the nation's largest lending institutions, a number of the States balked after learning that the settlement would have permitted the banks to remain clear of state or federal prosecution. Harold Meyerson, Opinion, *Eric Schneiderman, New York AG, Shaped Drive to Hold Banks Accountable*, WASH. POST (Jan. 31, 2012), https://wapo.st/2ObpA21. As a result of the States' involvement, the final consent judgment "does not prevent state and federal authorities from pursuing criminal enforcement actions." U.S. Dep't of Justice, Press Release No. 12-186, Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), https://bit.ly/1Vh7CMg.

C. The Dual Sovereignty Doctrine Actually Ensures Greater Double Jeopardy Protections.

Petitioner also fails to account for the significant benefits to liberty secured by our system of cooperative federalism, including enhanced protections from double jeopardy. Those protections will be impaired in the absence of the dual sovereignty doctrine.

1. The dual sovereignty doctrine has led to a cooperative system of state and federal laws that offers *greater* protections from double jeopardy. The Fifth Amendment's Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend. V. States have historically shielded their citizens from double jeopardy in ways more protective than the "same offence" restriction under the Double Jeopardy Clause. For example, whereas in

seventeenth century England double jeopardy "meant that no man's *life* ought twice to be placed in jeopardy for the same offense," the Massachusetts colony adopted a rule that was far more protective, as it "extended to all types of criminal prosecutions and to civil trespasses as well." Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 285, 300 (1963) (emphasis added).

Since the Founding, States have continued to enact diverse double jeopardy protections. See ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS § 4 (2001) (compiling laws). Take, for instance, New York, which has imposed broad dual sovereignty limitations since 1829. The state's constitution contains a double jeopardy clause with nearly identical language to the federal clause, but New York's clause "has been interpreted to give more protection to defendants than the federal double jeopardy clause in some contexts." *Id.* at 217 n.1. New York also provides enhanced statutory protection from double jeopardy, as the state's statute protects individuals from successive prosecutions "based upon the same act or criminal transaction." N.Y. CRIM. PROC. LAW § 40.20. The State has carved out limited exceptions to this rule in order to protect its ability to prosecute unimpeded where "legitimate state law enforcement interests" so warrant. KURLAND, *supra*, at 219. This approach safeguards *both* individual liberty *and* state sovereignty.

States have also imposed heightened double jeopardy protections in subject-specific areas. One example is the Uniform Controlled Substances Act, which provides: "If a violation of this [Act] is a violation of a federal law or the law of another State, a conviction or acquittal under federal law or the law of another

State for the same act is a bar to prosecution in this State." UNIF. CONTROLLED SUBSTANCES ACT § 418 (UNIF. LAW COMM'N 1994), https://bit.ly/2JpxlAE. The majority of states have adopted the Act, including its double jeopardy protections, in one form or another. Uniform Law Commission, *Legislative Fact Sheet – Controlled Substances Act*, https://bit.ly/2RlNTfG (last visited Oct. 30, 2018); see MICH. COMP. LAWS § 333.7409; WASH. REV. CODE § 69.50.405; OKLA. STAT. tit. 63, § 2-413; N.Y. PUB. HEALTH LAW § 3396(3).

The federal government has also taken steps to eliminate successive prosecutions. Although its patchwork of statutes and policies is not as protective as many state regimes, Congress has enacted protections against double jeopardy in a variety of areas where federal criminal jurisdiction is concurrent with the States. See, *e.g.*, 18 U.S.C. § 659 (embezzlement statute providing that "[a] judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts."). The Department of Justice (DOJ) has done the same through its Petite Policy, which "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)," unless to vindicate particular federal interests. U.S. Dep't of Justice, *U.S. Att'ys Manual* § 9-2.031 (2009). As Respondent has indicated, this policy has led DOJ to decline successive prosecutions in over 1,200 cases in a recent eight-year period. Resp. Br. 54 (citing Bureau of Justice Statistics, *Federal Justice Statistics*, https://bit.ly/2yGbFMJ (Statistical Tables for 2006-2013)).

Elimination of the dual sovereignty threatens these cooperative efforts. It takes no great forecasting to

understand that, without the dual sovereignty doctrine, state authorities would likely revisit their heightened double jeopardy protections in order to ensure that they retain the authority to prosecute where law enforcement needs dictate.

The former New York Attorney General, for example, expressed an interest in revisiting his state's double jeopardy statute out of a concern that the presidential pardon power could be used to undermine the State's ability to prosecute. In a letter addressed to the New York Governor and Legislature, he noted his concern that, "due to a little-known feature of New York [double jeopardy] law that appears to be unique in its reach—a strategically-timed pardon could prevent individuals who may have violated our State's laws from standing trial in our courts as well." Letter from N.Y. Att'y Gen. Eric T. Schneiderman to Gov. Andrew Cuomo et al. (Apr. 18, 2018), https://on.ny.gov/2Hxck8N. Reactive decisions like this are the natural result of competitive, rather than cooperative, federalism, and similar results will yield in the absence of the dual sovereignty doctrine. States may also be eager to craft new "offences" that could avoid the Fifth Amendment's double jeopardy bar.

2. The dual sovereignty doctrine also fosters coordination among federal, state, and local officials in ways that serve individual liberty. Coordination among sovereigns is a recognition of the reality that the Framers "designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz* v. *United States*, 521 U.S. 898, 919–20 (1997). And coordination between local, state and federal prosecutors continues to be "conventional practice between the two sets of

prosecutors throughout the country." *Bartkus*, 359 U.S. at 123.

But eliminating the dual sovereignty doctrine would make law enforcement a more competitive enterprise, to the detriment of individual liberty, in several significant ways. *First*, as *amici* can attest, evidence sharing between state and federal law enforcement leads prosecutors to determine that criminal charges are, in many cases, unwarranted. If, however, sharing information will lead to preemptive prosecutions, state officials will be much less likely to do so. *Second*, it would cause law enforcement in certain cases to devote less time to the underlying investigation, as prosecutors would fear ceding authority to another sovereign if they do not rush to prosecute. The results of this system are obvious: if law enforcement is made more competitive, individual liberty will be sacrificed in the cross-fire, given that more thorough investigations often lead prosecutors not to file charges. *Third*, to the extent that a state's criminal statute provides lesser penalties than its federal counterpart, and therefore less leverage over an offender in an investigation, states will be incentivized—perversely—to increase penalties.

In short, Petitioner's position would frustrate the cooperative federalism that has over the centuries secured a regime more protective of individual liberty than the Double Jeopardy Clause.

D. Eliminating The Dual Sovereignty Doctrine Will Undermine Political Accountability.

Federalism's diffusion of power is also geared toward enhancing political accountability, and the importance of that accountability is particularly important where criminal justice is concerned.

"[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function." *Lopez*, 514 U.S. at 576-77 (Kennedy, J. concurring). Eliminating the dual sovereignty doctrine, however, would allow federal prosecutors to preempt state authority over local criminal activity such that "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

There is no question that state and local governments are responsible for the vast majority of criminal prosecutions in the United States—and rightly so. "In 2003, state and local governments were responsible for 96 percent of those under correctional supervision—i.e., in prison or jails, on probation or parole. Similarly, in 2004 just 1 percent of the over 10 million arrests made nationwide were for federal offenses." *Exploring the National Criminal Justice Commission Act of 2009: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm on the Judiciary*, 111th Cong. 4 (2009) (written statement of Brian W. Walsh). With that responsibility comes accountability: "[b]ecause primary law enforcement responsibility rests with the states, state prosecutors are blamed for underenforcement, not federal prosecutors. Similarly, federal prosecutors do not concern themselves as much with how their selection of cases affects a community. They do not have an obligation to fix local problems, and they are not directly accountable to those communities." Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 536 (2011).

The dual sovereignty doctrine gives state and local officials the flexibility to answer this accountability. Erasing the doctrine, by contrast, strips state and lo-

cal officials of inherent control over public reactions. Local officials would remain the face—and scapegoats—of under-enforcement and other law enforcement failures, even when their hands are tied by an earlier federal prosecution. Consider the recent prosecution of Darren Wilson (the police officer in Ferguson, Missouri who shot Michael Brown). In that case, and amid a national outcry over police shootings, St. Louis County Prosecutor Robert McCulloch chose not to appoint a special prosecutor and instead sought a grand jury indictment. Ultimately, no indictment was returned against Officer Wilson. Federal prosecutors later issued a memorandum, declining to bring their own charges. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), https://bit.ly/2OHW8pK.

In addressing the federal prosecutors' declination, Mr. McCulloch suggested that his critics should "rethink their position" or at least "level the same criticism at the Department of Justice, if they want to be consistent." Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), https://nyti.ms/2JaxNTt. But given the faceless, and distant, nature of the federal investigation, St. Louis voters had nowhere to effectively target that criticism. Instead, they recently elected a new county prosecutor in Mr. McCulloch's place (he had served in the post since 1991). Cleve R. Wootson, Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, WASH. POST (Aug. 8, 2018), https://wapo.st/2OH7ZUT.

In this instance, as in countless others, the political ramifications for the outcome fell directly on the

shoulders of the local prosecutor, while federal prosecutors—largely unaccountable politically—remained insulated from any reprisal. Federal prosecutors did not even list their names on the memorandum declining to prosecute. The dual sovereignty doctrine thus ensures that political accountability remains *justifiably* with state and local prosecutors, who would otherwise relinquish prosecutorial control while alone facing any political fallout.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. With its affiliates, it represents more than 40,000 attorneys. NACDL is dedicated to advancing the proper, efficient, and just administration of laws. It frequently appears as an *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the separate-sovereigns exception erodes the fundamental protection against successive prosecutions that is enshrined in the Double Jeopardy Clause of the Fifth Amendment and made applicable to the States through the Fourteenth Amendment.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work for federal public and community

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the NAFD is to promote the interests of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Each year, federal defenders represent tens of thousands of individuals in federal court, including defendants who are subject to successive federal and state prosecution for the same offenses. Thus, NAFD has a particular interest in this case because the separate-sovereigns exception affects defendants the NAFD's constituent organizations represent each year.

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of individual rights guaranteed by the state and federal constitutions, and the improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of more than 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts as *amicus curiae*.

SUMMARY OF THE ARGUMENT

The constitutional prohibition against double jeopardy "is intrinsically personal." *United States v. Halper*, 490 U.S. 435, 447 (1989). "[D]eeply ingrained in at least the Anglo-American system of jurisprudence," the double jeopardy prohibition "was designed to protect an individual from being subject-

ed to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

The separate-sovereigns exception "hardly serves that objective." *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring, joined by Thomas, J.). In fact, the exception erodes the protection of the Double Jeopardy Clause, allowing state and federal governments—often working together—to use their combined resources to successively prosecute and punish individuals for the identical offense. Two Justices of this Court recently (and rhetorically) asked, "[I]s it not 'an affront to human dignity,' . . . 'inconsistent with the spirit of [our] Bill of Rights,' . . . to try or punish a person twice for the same offense?" *Id.* (second alteration in original) (citations omitted).

Decades of "judicial and scholarly criticism" have concurred. *See United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997). Published critiques of the separate-sovereigns exception date back to at least 1932, are numerous, and have continued into this century. *See* Pet. Br. at 33-34 & nn.1-2. The separate-sovereigns exception was always inconsistent with the original understanding of the Double Jeopardy Clause. *See id.* at 9-27. And the incorporation of the Double Jeopardy Clause against the States eroded whatever ostensible validity the exception had. *See id.* at 35-41.

If this were not reason enough to justify departing from *stare decisis*, the practical considerations originally supporting the separate-sovereigns exception no longer apply. Most notably, federal criminal law in the nineteenth and early twentieth centuries was

limited in nature. *See United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring). With federal laws enacted only to address those special federal interests, the potential for federal prosecutions in general—let alone successive prosecutions by federal and state authorities—was of little concern. Today, of course, the proliferation of federal criminal offenses significantly overlaps state provisions, frequently implicating the separate-sovereigns exception. Moreover, federal and state officials now often work as partners in criminal prosecutions, not as competing or siloed-off entities. This practical reality further undermines the rationale for the separate-sovereigns exception.

This Court should apply the accepted logic of incorporation to the Double Jeopardy Clause's protection against successive prosecutions and abolish a doctrine that has far outlived its rationales.

ARGUMENT

I. THE FOUNDATIONS OF THE SEPARATE-SOVEREIGNS EXCEPTION HAVE ERODED

Despite the demands of *stare decisis*, this Court has explained that it is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The doctrine "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Precedent should be reconsidered when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine" and

when the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833, 855 (1992).

As Petitioner has thoroughly and persuasively explained, the separate-sovereigns exception is inconsistent with the original understanding of the Double Jeopardy Clause, Pet. Br. at 10-30, and the incorporation of the Double Jeopardy Clause against the States entirely undermined whatever validity the exception initially purported to have, *id.* at 35-41. Premised on the idea that the Double Jeopardy Clause did not apply to the States, *id.*, the Court repeatedly upheld the separate-sovereigns exception prior to the incorporation of the Double Jeopardy Clause against the States. *See Bartkus v. Illinois*, 359 U.S. 121, 136-38 (1959); *Abbate v. United States*, 359 U.S. 187, 196 (1959); *United States v. Lanza*, 260 U.S. 337 (1922). However, the Court's decision to incorporate the Double Jeopardy Clause in *Benton v. Maryland*, 395 U.S. 784 (1969), "undermine[d] the logical foundation" for the separate-sovereigns exception. *Elkins v. United States*, 364 U.S. 206, 214 (1960) (after incorporation of Fourth Amendment, rejecting "silver platter" exception permitting federal law enforcement use of evidence unlawfully seized by state officers in violation of the Fourth Amendment); *see also Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (concurrent with incorporation of privilege against self-incrimination, overturning doctrine allowing one sovereign to rely on testimony procured by another in violation of the Fifth Amendment).

The practical reality of dual sovereign law enforcement has evolved as well. Indeed, standard practices and their surrounding circumstances have changed to such a degree as to deprive the separate-sovereigns exception of its practical foundation. The separate-sovereigns exception relies on the outdated premise that the state and federal criminal systems operate in separate spheres and vindicate disparate interests. The exception was established at a time when federal criminal prosecutions were rare. But federal criminal law has expanded dramatically in recent decades and now encompasses large swaths of local conduct. As a result, the threat of successive prosecution by the federal government and the States is far greater than it was when the separate-sovereigns exception developed. Moreover, cooperation between state and federal law enforcement has surged in recent years. For all these reasons, the separate-sovereigns exception has been robbed of its original practical justifications and should be overruled.

A. The Purview of Federal Criminal Law Has Expanded Dramatically Since *United States v. Lanza*

In the eighteenth and nineteenth centuries, the federal government's role in criminal law was minimal. After all, "[t]he Constitution itself gives Congress jurisdiction over only a few crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 6 (1997) [hereinafter "*Expanding Federalization*"] (footnotes omitted). The Founders did not envision a

wide-ranging "national police power." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1138 (1995) [hereinafter "*Criminal Mischief*"]. Thus, "[f]or years following the adoption of the Constitution in 1789, the States defined and prosecuted nearly all criminal conduct." ABA Crim. Just. Sec., Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 5 (1998).

Indeed, "early federal criminal laws addressed only issues of special federal interest." *Criminal Mischief* at 1138. For example, the Crimes Act of 1790 prohibited "forgery of United States certificates and other public securities, perjury in federal court, treason, piracy, and committing acts of violence against an ambassador," as well as "murder and other crimes committed in a fort or other place controlled by the federal government" and "crimes committed outside the jurisdiction of any state." *Id.*

Congress began enacting criminal laws "extending beyond direct federal interests" only after the Civil War. *Id.* at 1139. During Reconstruction, the federal government was given jurisdiction over criminal laws that state courts were unwilling to enforce. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27. Shortly thereafter, Congress enacted laws prohibiting mail fraud and the mailing of obscene materials. *Criminal Mischief* at 1140. In the early twentieth century, Congress began to increasingly rely on its interstate commerce power in enacting criminal laws. This led to prohibitions such as "the Mann Act (prohibiting transporting a woman across state lines for illicit purposes), the Dyer Act (prohibiting transporting a stolen motor vehicle across state lines), the Volstead

Act (just plain Prohibition), and statutes forbidding interstate transportation of lottery tickets, interstate transportation of obscene literature, and selling liquor through the mail." *Id.* at 1142 (footnotes omitted).

After this long and steady creep of federal criminal jurisdiction, the criminal code began expanding exponentially in the late 1960s, when Congress began passing sprawling omnibus crime legislation. These new and massive federal frameworks included

> the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994.

Id. at 1145 (footnotes omitted). These laws increasingly inserted federal law enforcement into what had previously been considered local crime.

Today, the Federal Criminal Code reflects an extraordinary departure from early American practice. A 2010 publication estimated that federal law contains 4,450 criminal provisions. *See* Brian W. Walsh & Tiffany M. Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law 6 (2010). Those provisions cover a surprising variety of conduct, including the following actual federal crimes: "reproduc[ing] the image of 'Woodsy Owl' and 'Smokey the Bear'," "transport[ing]

false teeth into a state without the permission of a local dentist," "transport[ing] water hyacinths in interstate commerce," "issu[ing] a check for a sum less than one dollar not intended to circulate as currency," "impersonat[ing] a 4-H club member," "issu[ing] a false weather report on the representation that it is an official weather bureau forecast," and "issu[ing] a false crop report." Roger Miner, *Crime and Punishment in the Federal Courts*, 43 Syracuse L. Rev. 681, 681 (1992) (footnote omitted). Those are in addition, of course, to the government's broad authority to prosecute mail fraud, *see* 18 U.S.C. § 1341, wire fraud, *see id.* § 1343, robbery or extortion, *see id.* § 1951, and other more commonplace crimes.

Even with this wide variety of tools at their disposal, federal prosecutors have been increasingly eager to stretch existing law beyond its outer bounds. For example, a few Terms ago this Court addressed the federal government's contention that the Chemical Weapons Convention Implementation Act of 1998 criminalized "purely local crime[s]" such as "an amateur attempt by a jilted wife to injure her husband's lover" using household chemicals—even though that conduct "ended up causing only a minor thumb burn readily treated by rinsing with water." *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014). The Court held that the Implementation Act did not cover such insignificant local conduct. Indeed, the Court reminded the federal prosecutors that "our constitutional structure leaves local criminal activity primarily to the States." *Id.*

One year later, the Court again reminded prosecutors that federal criminal laws do not carry limitless authority. In *Yates v. United States*, 135 S.

Ct. 1074 (2015), the Court held that the disposal of an undersized fish was not criminalized by the document-shredding provision of the Sarbanes-Oxley Act of 2002, 116 Stat. 745. That legislation was originally "designed to protect investors and restore" the nation's "trust in financial markets." *Yates*, 135 S. Ct. at 1079. But the defendant in *Yates*, a commercial fisherman, had been prosecuted and convicted of violating the Act because he threw an undersized grouper back into the water after his boat was stopped by federal authorities, thereby destroying "tangible" evidence of a federal offense. *Id.* at 1079-81. The Court held that the provision did not stretch so far, again reining in an overexpansive interpretation of federal criminal authority. *Id.* at 1088-89.

The foundation of the separate-sovereigns exception was laid long before this explosion of federal criminal jurisdiction and the recent era of prosecutorial overreach. In the early case of *Fox v. Ohio*, 46 U.S. 410 (1847), for example, the Court believed successive prosecution would be rare. The Court reasoned,

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

Id. at 435. *Fox*, of course, was decided before the Civil War, at a time when federal criminal laws were few.

In *United States v. Lanza*, 260 U.S. 337 (1922), a prohibition-era case, the Court expressed concern that an absolute bar on successive prosecutions might prevent the federal government from protecting uniquely federal interests. *Id.* at 385. At the time, however, the federal criminal apparatus was still miniscule. For example, in 1922, the federal government had only begun to establish its own prisons. The first federal prison opened in 1895, and two more were added shortly thereafter. *Criminal Mischief* at 1147. "Those three facilities," which housed only a few thousand convicts, comprised "the sum total of the federal prison 'system' until 1925"—after *Lanza* was decided. *Id.* Today, by contrast, 122 prison facilities house more than 182,000 federal inmates. *See* Federal Bureau of Prisons, *Statistics*, www.bop.gov/about/statistics/population_statistics.jsp (last visited Sept. 6, 2018). Those statistics underscore the exponential growth of the federal criminal system.

The next two separate-sovereign cases—*Bartkus* and *Abbate*—also were decided well before the recent expansion of federal criminal law; a nearly unrecognizable legal landscape in comparison. At the time, no concerted federal effort to combat organized crime, small drug offenses, or domestic violence existed. *See Criminal Mischief* at 1145. Today, those prosecutions are staples of every federal district court's docket—duplicating the efforts of many state courts.

As Attorney General Meese observed,

> [i]n the previous era of separate and distinct roles for the federal and state governments in law enforcement, the dual sovereignty exception to double jeopardy protection was unfortunate but tolerable. However, in an era of the federalization of crime, there is little difference between the federal government and state governments in law enforcement because the federal government has duplicated virtually every major state crime.

Expanding Federalization at 22.

In response to concerns about the fairness implications of the multiple prosecution power, in 1977 the United States Department of Justice enacted a federal "*Petite* policy" regulating successive prosecutions of "substantially the same act(s) or transgressions." U.S. Dep't of Justice, United States Attorneys' Manual ("USAM") § 9-2.031 (updated July 2009); *see Petite v. United States*, 361 U.S. 529 (1960). This policy, however, confers no substantive rights on defendants, and allows the federal government to pursue a successive prosecution when, in its estimation, the case implicates a "substantial federal interest" purportedly left unvindicated by the prior state conviction. USAM § 9-2.031.

Left to the government's discretion, implementation of the policy has failed to meet the challenge posed by the separate-sovereigns exception. *See* Pet. Br. at 46-49. Moreover, as the government acknowledges, this discretionary policy has not been a

bulwark against cases implicating dual sovereignty controversies. *See, e.g.*, Resp't Br. in Opp'n to Pet. Cert. 5 (citing *Walker v. Texas*, 137 S. Ct. 1813 (2017) (mem.); *Roach v. Missouri*, 134 S. Ct. 118 (2013); *Donchak v. United States*, 568 U.S. 889 (2012); *Mardis v. United States*, 562 U.S. 943 (2010); *Angleton v. United States*, 538 U.S. 946 (2003); *Sewell v. United States*, 534 U.S. 968 (2001); *Koon v. United States*, 515 U.S. 1190 (1995)); *see also Tyler v. United States*, No. 17-5410 (U.S. docketed July 28, 2017); *Ochoa v. United States*, No. 17-5503 (U.S. docketed Aug. 4, 2017); *Bearcomesout v. United States*, No. 17-6856 (U.S. docketed Nov. 22, 2017); *Gordillo-Escandon v. United States*, No. 17-7177 (U.S. docketed Dec. 20, 2017); *Hall v. United States*, No. 17-9221 (U.S. docketed June 5, 2018).[2]

Those advocating on behalf of criminal defendants, including *amicus* NAFD, can attest to this. In NAFD's experience, it is not uncommon for the federal government, despite the *Petite* policy, to prosecute an individual who already has been prosecuted at the state level for identical or substantially the same conduct, as happened in this very case. The federal government pursues such dual prosecutions against defendants across criminal offenses and jurisdictions throughout the country. *See, e.g.*, *United States v. Stokes*, 124 F.3d 39, 41-42 & n.1 (1st Cir. 1997) (observing that federal government obtained a waiver of

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[2] The cited cases are examples of those ultimately making their way to the Supreme Court. Given the high volume of criminal cases that resolve in guilty pleas or otherwise do not reach the Supreme Court, the cited cases presumably represent a small percentage of those that have presented separate-sovereigns exception concerns.

the *Petite* policy in Massachusetts case); Appellant's Excerpts of Record, Vol. I of II at 97, *United States v. Perez*, No. 17-10216 (9th Cir. Sept. 18, 2017), ECF No. 5 (noting federal government obtained *Petite* policy waiver for criminal charge in California); Government's Sentencing Memorandum at 2, n.1, *United States v. Salant*, Case No. 6:12-CR-00185-AA (D. Or. Nov. 1, 2012), ECF No. 21 (stating that federal government obtained waiver of *Petite* policy after defendant already had been sentenced in state court for same offense); Government's Opposition to Defendant's Motion to Dismiss for Violation of Double Jeopardy Clause at 4, *United States v. Storm*, Case No. 3:11-cr-00373-SI (D. Or. May 22, 2012), ECF No. 31 (acknowledging that federal government sought and obtained permission to bring successive prosecution).

The Court should reevaluate the holdings of *Lanza*, *Bartkus*, and *Abbate* based on the reality that federal criminal law today is pervasive and the *Petite* policy falls far short of providing the essential protection against oppressive multiple prosecutions that the Framers enshrined in the Double Jeopardy Clause.

B. Federal and State Law Enforcement Often Work Jointly in Cooperation

In *Lanza*, the Court imagined a scenario in which the state and federal governments had such inconsistent interests that a state prosecutor might attempt to subvert federal criminal law. 260 U.S. at 385. That hypothetical, however, is not representative of the reality that criminal defendants face today. Rather, "[t]he degree of cooperation between state and federal officials in criminal law enforcement

has . . . reached unparalleled levels." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499 (Calabresi, J., concurring). This increasing state-federal prosecutorial cooperation further undermines the underpinnings of the separate-sovereigns exception.

Cooperation and collaboration between state and federal law enforcement "is a regular and, in some fields, pervasive feature of the modern American criminal justice system." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 7 (1992) [hereinafter "*False Sovereigns*"]. Indeed, as early as 1964 this Court observed that criminal prosecutors had embraced the "age of 'cooperative federalism,' [in which] the Federal and State Governments are waging a united front against many types of criminal activity." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-56 (1964).

Courts have commented with increasing regularity on the prevalence of collaborative investigations and prosecutions. The Second Circuit has observed, "[a]s the challenge facing the nation's law enforcement authorities has grown in sophistication and complexity, cooperation between federal and local agencies has become increasingly important and increasingly commonplace." *United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990). The Seventh Circuit has also noted instances of "commendable cooperation between state and federal law enforcement officials." *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989); *see also United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979) ("[C]ooperation between state and federal authorities is a welcome innovation."); *United States v. Searp*,

586 F.2d 1117, 1121 (6th Cir. 1978) ("In this case, the investigation into the bank robberies, which were simultaneously state and federal crimes, was a joint undertaking between the Kentucky police and the FBI from the beginning."). State courts have noted a similar increase in collaboration. *See, e.g.*, *State v. Fletcher*, 240 N.E.2d 905, 911 (Ohio Ct. Com. Pl. Cuyahoga Cty. 1963) ("The cases are replete with examples of the entirely commendable practice of hand-in-glove co-operative efforts by state and federal authorities to investigate crime, gather evidence, and prosecute criminals."), *aff'd*, 259 N.E.2d 146 (Ohio Ct. App. 1970), *rev'd*, 271 N.E.2d 567 (Ohio 1971).

These collaborations are, in part, the result of an increasing number of federal-state joint task forces. For example, the federal Drug Enforcement Administration ("DEA") manages 271 state and local task forces, "staffed by over 2,200 DEA special agents and over 2,500 state and local officers." DEA, *Task Forces*, https://www.dea.gov/ops/taskforces.shtml (last visited Sept. 6, 2018). There are also 104 Joint Terrorism Task Forces, which "include approximately 4,000 members nationwide . . . hailing from over 500 state and local agencies and 55 federal agencies." Fed. Bureau of Investigation, *Joint Terrorism Task Forces*, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (last visited Sept. 6, 2018). U.S. Immigration and Customs Enforcement also runs a massive anti-money laundering task force that "consists of more than 260 members from more than 55 state and local law enforcement agencies." U.S. Immigration and Customs Enforcement, *Money Laundering*, https://www.ice.gov/money-laundering (last visited Sept. 6, 2018).

These joint enterprises are authorized by federal legislation and are often embodied in formal state-federal agreements. *See, e.g.*, 18 U.S.C. § 2518(5) (expressly allowing federal agents to enlist the help of non-federal personnel in conducting federally authorized electronic surveillance operations); 21 U.S.C. § 873(a) (authorizing the Attorney General to share information regarding narcotics operations, cooperate in state prosecutions, and enter into agreements with state and local agencies "to provide for cooperative enforcement and regulatory activities"). Indeed, the task force system encourages,

> where appropriate, the cross designation of Federal attorneys and state and local attorneys; the deputation of state and local police officers as Special Deputy U.S. Marshals; the payment of certain overtime, travel, and per diem costs for state and local officials engaged in Task Force work; and the signing of agreements to set forth the nature of the understanding between the Task Forces and the state and local jurisdictions.

False Sovereigns at 68 n.345 (citation omitted); *see also* Gabriel J. Chin, *Controlling the Criminal Justice System: Colorado as a Case Study*, 94 Denver L. Rev. 497, 506 (2017) ("Federal law also provides that [state] attorneys who are not federal prosecutors may be made Special Assistant U.S. Attorneys to participate in or pursue federal cases.").

The Court previously expressed a fear that one sovereign may "hinder" the interests of the other. *See Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (arguing that federal prosecution would result in a

"deprivation of the historic right and obligation of the States to maintain peace and order within their confines"); *Abbate v. United States*, 359 U.S. 187, 195 (1959) (noting that prior state prosecution would mean "federal law enforcement must necessarily be hindered"). However, increasing state and federal cooperation makes those concerns far less relevant today.[3]

The current degree of cooperation between federal and state law enforcement officials to enforce an increasingly overlapping set of criminal laws should "cause one to wonder whether it makes much sense to maintain the fiction that federal and state gov-

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[3] To the extent the Court is concerned that federal law enforcement's interests may be unprotected without the separate-sovereigns exception (in the rare case in which federal and state interests diverge despite the fact that the two sovereigns are by definition prosecuting the defendant for the same offense), other methods could ensure the vindication of uniquely federal concerns. Congress could preempt state legislation in certain spheres of criminal law. *See, e.g.*, Note, *Double Jeopardy and Federal Prosecution after State Jury Acquittal*, 80 Mich. L. Rev. 1073, 1077 (1982). Scholars also have suggested that "selective" preemption might protect federal interests by allowing federal prosecutors to enjoin (or perhaps remove) specific state-level cases that tread on federal jurisdiction. *See* Ophelia S. Camina, Note, *Selective Preemption: A Preferential Solution to the* Bartkus-Abbate *Rule in Successive Federal-State Prosecutions*, 57 Notre Dame L. Rev. 340, 360-62 (1982). Still others have argued that consecutive civil rights prosecutions aimed at vindicating federal constitutional interests should be permitted. *See, e.g.*, Paul L. Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649, 659-71 (1994). In those cases, some have argued, other constitutional interests would counterbalance double jeopardy concerns. *Id.* at 670. And, of course, in those same civil rights cases, subsequent civil actions may also be possible under federal *civil* statutes. *Id.* at 673-74.

ernments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499 (Calabresi, J., concurring). Other commentators have suggested that, "in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Columbia L. Rev. 1, 48 (1995).

This Court has observed that the protection offered by the Double Jeopardy Clause "is intrinsically personal." *United States v. Halper*, 490 U.S. 435, 447 (1989). And "from the standpoint of the individual who is being prosecuted, . . . it hurts no less for two 'Sovereigns' to inflict" the pain of successive prosecutions "than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Whether a defendant faces a successive prosecution by the State or the federal government:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).[4]

The time has come to cast aside the fiction that two separate sovereigns pursue two separate agendas when prosecuting the same person for the same crime. The separate-sovereigns exception to the Double Jeopardy Clause should be overruled.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[4] Because the Double Jeopardy Clause applies to the federal government as well as the States, *see Benton v. Maryland*, 395 U.S. 784 (1969), "it matters not whether [a defendant's] constitutional right has been invaded by a federal agent or by a state officer." *Elkins v. United States*, 364 U.S. 206, 214 (1960). The Court should thus overturn both *Bartkus* (state prosecution following federal prosecution) and *Abbate* (federal prosecution following state prosecution).

Respectfully submitted,

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No. 17-646

IN THE

Supreme Court of the United States

TERRENCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

As national organizations working to end domestic violence and sexual assault against Native women and children, the National Indigenous Women's Resource Center ("NIWRC") and the National Congress of American Indians ("NCAI") understand the significance of the "separate sovereigns" doctrine and the role it plays in ensuring the effective prosecution of those who seek to harm Native women and children.

The NIWRC is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. The NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience in Tribal Courts, tribal governmental process, and programmatic and educational work to end violence against Native women and children, including domestic violence and sexual assault.

NCAI is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian Tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian Tribes and improve the welfare of American Indians. It frequently participates in matters before this Court that implicate the

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief.

interests of Indians and Indian Tribes. As relevant here, American Indian and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work.

As organizations committed to ending violence against Native women, *Amici* have a unique perspective on the relationship between Congress's authority over Indian affairs, the inherent sovereign authority of Tribal Nations to prosecute crimes committed against their own citizens, and safety for Native women and children.

SUMMARY OF THE ARGUMENT

Overturning the Court's long-standing precedent regarding the dual sovereign doctrine, which has allowed both tribal and the federal governments to prosecute for violations of their respective criminal laws, would have significant ramifications in Indian country. Not only would it undermine core principles of local control for criminal justice, it would preclude the effective prosecution of those who commit serious violent crimes against Native women and children.

Today, Native women and children face the highest rates of domestic violence, murder, and sexual assault in the United States. The ability of both sovereigns to prosecute takes on heightened importance in light of the sentencing limitations placed on Tribal Courts by the federal Indian Civil Rights Act and the well-documented challenges the federal government has in investigating and prosecuting inherently local crimes,

which it is often times poorly suited to do on its own without assistance or local collaboration.

Within the complex web of jurisdictional determinations that the separate sovereigns must undertake, U.S. Attorneys and Tribal Prosecutors have grown accustomed to the existing jurisdictional scheme, which allows for concurrent jurisdiction and the possibility of prosecution by two sovereigns in many cases. Changing this rule would destabilize an already precarious jurisdictional scheme at the expense of victims, particularly those who experience serious domestic or sexual violence.

That is, the eradication of the "separate sovereigns" doctrine would require a Tribal Nation to decide whether to prosecute a case before the U.S. Attorney has had sufficient time to perform the necessary investigation to determine whether he or she will prosecute under federal law and sentencing authority. The Tribal Nation may be forced to go ahead and prosecute, and without the "separate sovereigns" exception, such a prosecution would then preclude the possibility of a more meaningful and deterrent sentence authorized under federal jurisdiction. *See United States v. Wheeler*, 435 U.S. 313, 331 (1978) ("Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated."). And thus, until or unless tribal criminal jurisdiction—and sentencing authority—is fully and completely restored, federal prosecutions will remain an essential tool in preserving the safety of Native women and children in their own homes.

A decision to overturn the "separate sovereigns" doctrine in its entirety, therefore, would significantly

increase the danger Native women and children face from domestic violence and sexual assault crimes committed on tribal lands. This Court should preserve the "separate sovereigns" doctrine as applied to prosecutions by both tribal governments and the federal government, either by rejecting Petitioner's arguments in their entirety or by making it clear that this Court's decision in this case should not be read as addressing the unique considerations presented in the context of dual federal and tribal prosecutions. This is both the correct application of this Court's longstanding precedents concerning the pre-constitutional and inherent sovereignty of Tribal Nations, as well as a practical necessity given the sentencing and jurisdictional limitations now imposed on the authority of Tribal Nations.

Petitioner's broad arguments bear no relation to the application of the "separate sovereigns" doctrine within the context of Tribal Court prosecutions. Petitioner argues that "[t]his Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause" because "[t]he separate-sovereigns exception is incompatible with the text, original meaning, and purpose of the Double Jeopardy Clause." Pet'r's Br. 4. None of Petitioner's arguments, however, support overturning the doctrine as applied to Tribal Court prosecutions.

For instance, Petitioner avers that this Court's decision in 1967 to incorporate the Bill of Rights against the States commands the erasure of the doctrine in its entirety because "[t]he separate-sovereigns exception developed on the understanding that the Double Jeopardy Clause did not apply to the states, and has not been re-visited since the Court held to the contrary," and thus "[i]ncorporation eliminated the

separate-sovereigns exception's doctrinal justification." Pet'r's Br. 7-8.

Congress, however, has determined that the Double Jeopardy Clause does not bar joint federal and tribal prosecutions for the same or similar crimes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (affirming Congress's decision not to incorporate the Bill of Rights as a whole and instead "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). This Court's decision to incorporate the Bill of Rights against the States, therefore, in no way constitutes a limitation on the inherent right of Tribal Nations to prosecute crimes on tribal lands, nor does it infringe on Congress's decision to apply the Double Jeopardy Clause to Tribal Court prosecutions in a manner that would preclude dual federal and tribal prosecutions. As such, the incorporation of the Bill of Rights against the States does not support the eradication of the "separate sovereigns" exception in its entirety.

Petitioner next asserts that "[t]he separate-sovereigns exception [] conflicts with . . . core principles of federalism" and "turns the liberty-preserving purpose of federalism on its head." Pet'r's Br. 6-7. Petitioner's argument, however, wrongfully assumes that the "separate sovereigns" exception was crafted only to address the intersections of criminal prosecutions between two interrelated sovereigns: the United States and the States.

It was not. The "separate sovereigns" doctrine, since its inception, has preserved the inherent sovereign authority of Tribal Nations, as well as the federal government's concomitant trust duty and obligation to protect Native women and children from those who

seek to repeatedly beat, batter, and abuse them. Nothing in the United States Constitution condones the departure from a doctrine that, within the complex landscape of federal Indian law, provides Native women and children with protection to deter domestic violence and sexual assault offenders. Quite the opposite, as a result of "the unique legal relationship of the United States to Indian tribes," the federal government has a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women," Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §901(6), 119 Stat. 3077 (2005) (VAWA 2005), and accordingly, the "separate sovereigns" doctrine must be preserved to ensure Native women and children are protected to the fullest extent possible under the law.

Petitioner's attempts to dismiss the "separate sovereigns" doctrine, therefore, should be denied and the doctrine should be preserved.

ARGUMENT

I. Eradicating The "Separate Sovereigns" Exception To The Double Jeopardy Clause Would Bring Dire Consequences To Native Women.

A. The Current Rates Of Violence Against Native Women Constitute A Crisis.

In 2016, this Court acknowledged that Native women experience the highest rates of violence in the United States. *See United States v. Bryant*, 136 S.Ct. 1954, 1959 (2016). And since this Court's decision in *Bryant*, the National Institute of Justice ("NIJ"), an arm of the United States Department of Justice, has released data revealing that Native women suffer rates of domestic violence and sexual assault even

higher than those cited by this Court in 2016. In May 2016, the NIJ released its report, *Violence Against American Indian and Alaska Native Women and Men*, documenting the astonishingly high rates of violence against Native people.[2] The report includes facts that are sufficiently stunning as to be almost incomprehensible. According to the NIJ's May 2016 report, more than 4 in 5 Native people have been victims of violent crime.[3] Over half (56.1%) of Native women report being victims of sexual violence.[4]

The high rates of violence against Native women and children constitute nothing short of an emergency that threatens the health, safety, welfare—and ultimately the sovereignty—of Tribal Nations. Widespread, commonplace sexual and domestic violence have taken a toll on Native communities. Victimization, and the unresolved trauma that follows, are directly linked to the significant mental and physical health disparities Native people experience in the United States.[5]

These disparities are most apparent in the statistics documenting the high rates of Post-Traumatic Stress Disorder ("PTSD") that Native women and children

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[2] *See, e.g.* Andre B. Rosay, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Violence Against American Indian and Alaska Native Women and Men* 44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[3] *Id.*

[4] *Id.* at 43.

[5] *See* J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 Prog. Brain Res. 2 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3226705/.

suffer.[6] These high rates of PTSD are directly linked to the extraordinarily high rates of violent crimes committed against Native women and children. Indeed, PTSD has been declared "one of the most serious mental health problems faced by . . . AI/AN populations."[7]

In 2014, the United States Attorney General's Advisory Committee released a report documenting that Native children experience higher-than-average rates of abuse.[8] The trauma in tribal communities is so significant that Native youth suffer PTSD at rates equivalent to soldiers returning from the wars in Afghanistan and Iraq.[9] And for Native American adults, the rate of PTSD is 4.4 times the national average.[10]

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[6] Deborah Bassett et al., *Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature*, 49 Soc. Psychiatry & Psychiatric Epidemiology 417 (2014).

[7] *Id.* at 418.

[8] U.S. Dep't Of Justice, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Att'y Gen.'s Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive* 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf [hereinafter *Ending Violence*] [https://perma.cc/E33X-85YG] ("American Indian and Alaska Native . . . children suffer exposure to violence at rates higher than any other race in the United States.").

[9] *Id.* at 38 ("[O]ne report noted that AI/AN juveniles experience post-traumatic stress disorder (PTSD) at a rate of 22 percent. Sadly, this is the same rate as veterans returning from Iraq and Afghanistan, and triple the rate of the general population.").

[10] Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, 2013 Nursing Res. & Prac. 1, 3 (2013).

PTSD, however, is not the inevitable result of trauma. Instead, PTSD is a consequence of *unresolved* trauma—that is, trauma for which there has been no adequate intervention.[11] Unresolved trauma is the leading cause of PTSD, which in turn burdens the victim with a wide variety of mental and physical maladies,[12] such as mental illness, addiction, and even chronic physical conditions such as chronic heart, lung, and liver disease.[13]

For many survivors, the prosecution of his or her perpetrator is critical to resolving the trauma resulting from the violent crime.[14] Of all American Indians who have suffered violence, around ninety percent have experienced violence perpetrated by a non-Indian. Yet in 1978, Tribal Nations lost the ability to exercise their inherent authority to prosecute crimes committed by non-Indians on tribal lands. *See Oliphant v. Suquamish*, 435 U.S. 191 (1978). Moreover, even where Tribal Nations retain their inherent authority to criminally prosecute, current federal law often limits their sentencing authority—thereby precluding the ability of a tribal prosecution to achieve effective

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[11] Cheryl Regehr & Tamara Sussman, *Intersections Between Grief and Trauma: Toward an Empirically Based Model for Treating Traumatic Grief*, 4 Brief Treatment & Crisis Intervention 289, 294 (2004).

[12] *See generally*, Bremner et al., *supra* note 5.

[13] *See* Jitender Sareen et al., *Physical and Mental Comorbidity, Disability, and Suicidal Behavior Associated With Posttraumatic Stress Disorder in a Large Community Sample*, 69 Psychosomatic Med. 242, 244-45 (2007).

[14] *See* Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceeding for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7 (1987).

resolution or closure, absent the duality of federal prosecution.

Laws that prevent prosecution of those who commit domestic violence and sexual assault against Native women and children directly contribute to the staggering levels of PTSD in tribal communities. Although violence against Native women and children traces its roots to the origins of colonial conquest, its continued cultural acceptance is made possible by a legal framework that prevents Tribal Nations from prosecuting a majority of the crimes committed against their women and children. Precluding the contemporary collaborations and dual prosecutions between federal and tribal governments, therefore, would only further perpetuate the crisis Native women and children now face.

B. Jurisdictional And Sentencing Limitations Imposed On Tribal Nations Renders Tribal-Federal Collaboration Critical For The Safety Of Native Women And Children.

The practical necessity of the "separate sovereigns" doctrine is made evident by the complex jurisdictional maze both federal and tribal sovereigns must navigate to determine which sovereign, in response to any given crime, may or should prosecute.

Discerning which sovereign may exercise criminal jurisdiction over a particular crime in Indian country is rife with complications. The current state of federal law dictates that, before a sovereign may exercise criminal jurisdiction over a crime committed in Indian country, the sovereign must determine (1) the status of the land where the crime was committed; (2) whether the perpetrator is Indian; and (3) whether the victim

is Indian. *See United States v. Lara*, 541 U.S. 193 (2004). Discerning these factual perquisites to the exercise of jurisdiction impedes the ability of police to respond in a timely manner to the heightened crisis of a domestic violence call, thereby placing Native women and children at greater risk.

To be sure, the legal obstacles to prosecutions in Indian country have been accumulating for more than a hundred years. In 1883, this Court concluded that the federal government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless or until Congress authorizes such jurisdiction.[15] *See Ex Parte Crow Dog*, 109 U.S. 556, 570 (1883) (the United States could not exercise jurisdiction over "the case of a crime committed in the Indian country by one Indian against the person or property of another Indian" unless so authorized by Congress); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States.").

In response to *Crow Dog*, Congress enacted the Major Crimes Act in 1885, authorizing federal criminal jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person. *See* 18 U.S.C. §§ 1152-53;

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[15] In *Ex Parte Crow Dog*, this Court interpreted § 2146 of the General Crimes Act as exempting from federal criminal jurisdiction any "crime committed in the Indian country by one Indian against the person or property of another Indian." 109 U.S. 556, 570 (1883) (citing Act of Feb. 18, 1875, c. 80, sec. 1, § 2146, 18 Stat. 318 (codified as amended at 18 U.S.C. § 1152)).

see also S. Rep. No. 90-841, 12 (1967) ("Congress enacted the 'Major Crimes Act' in 1885" in response to "an early Supreme Court case, *Ex parte Crow Dog*, 109 U.S. 556 (1883)").

The Major Crimes Act did not, however, give the federal government jurisdiction to prosecute any offense not enumerated in the Act, nor did it work to divest Tribes of their inherent jurisdiction over the Act's enumerated crimes. As a result, many crimes involving Indian offenders and non-Indian victims, particularly misdemeanor level assaults, are now the sole purview of the tribal government. Whereas more serious crimes involving only Indians,[16] and crimes involving a non-Indian victim and an Indian offender, may be prosecuted by both the tribal and federal government.[17]

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[16] Crimes in Indian country that involve only non-Indians generally fall under state jurisdiction. *See United States v. McBratney*, 104 U.S. 621, 624 (1881).

[17] Thanks to the enactment of 18 U.S.C. § 117(a), the federal government can also exercise criminal jurisdiction over what might otherwise be considered misdemeanor level domestic violence crimes if they are committed by "habitual offenders" as defined in § 117(a). *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (codified at 18 U.S.C. § 113); 18 U.S.C. § 117(a); *see also* 151 Cong. Rec. S4873-84 (daily ed. May 10, 2005) (statement of Sen. McCain) (Congress enacted 18 U.S.C. § 117(a) "[t]o close existing gaps in Federal criminal laws . . . [that fail] to address incidents of domestic violence" perpetrated against Native women). Congress also recently lowered the standard of assault in the Major Crimes Act from "serious bodily injury" to "substantial bodily injury." *See* 18 U.S.C. § 113; 18 U.S.C. § 117(a). The term "substantial bodily injury" means "bodily injury which involves—(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113(b)(1). The "substantial bodily injury" amendment means that Native women are no longer

Additionally, numerous federal laws, including Public Law 280 ("PL-280"), limit the charges that federal prosecutors can bring against both Indian and non-Indian offenders who commit crimes in Indian country located within certain States.[18] Pub. L. No. 83-280, 67 Stat. 588 (codified as amended 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, & 28 U.S.C. § 1360 (2012)). Specifically, PL-280 and PL-280-like statutes delegate the federal criminal jurisdiction created in the Major Crimes Act to certain State Governments. Thus, for assaults committed against Native women in those States, the federal government simply cannot intervene or press charges. *See* 18 U.S.C. § 1162.[19]

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required to wait until their body is disfigured or they lose the function of a bodily member and/or organ to witness their perpetrator's federal prosecution.

[18] Congress enacted PL-280 in 1953, effectively "shifting federal criminal jurisdiction over Indian Country to [select] states regardless of tribal consent." M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 674 (2011). Since its inception, PL-280 has been criticized for creating "jurisdictional uncertainty" between Tribes and States, the effects of which have resulted in a lack of law enforcement responsiveness due to States' "inability or unwillingness" to perform their mandated responsibilities under the law. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1635-37 (1998).

[19] "States with Indian country lands that do *not* appear to presently be affected directly or indirectly by P.L. 280 or P.L. 280-like statutes are Alabama, Arizona, Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota, and Wyoming." Leonhard, *supra* note 18 at 692 (emphasis added). In contrast, there are many States where federal law gives rise to the same jurisdictional issues resulting from PL-280. *See e.g.*, Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, §§ 7, 9, 101 Stat. 704, 707-10, (codified at 25 U.S.C. §§ 1771e, 1771g (2006));

And in 1978, this Court concluded that Tribal Nations could no longer exercise criminal jurisdiction over crimes committed by non-Indians on tribal lands, unless or until Congress elects to restore such jurisdiction. *See Oliphant v. Suquamish*, 435 U.S. 191, 195 (1978). Thus, prior to 1978, a Native woman or child suffering from domestic violence or sexual assault on tribal lands could seek the refuge of his or her tribal police, prosecutors, and courts—regardless of whether the perpetrator was Indian or non-Indian. After 1978, however, a Native woman or child's ability to secure safety from domestic violence and sexual assault offenders was rendered subject to a complex set of rules that—in all too many instances—made calling the police useless—if not dangerous.

This complex set of rules is often referred to as a "jurisdictional maze,"[20] or as some Members of Congress now refer to it, "a jurisdictional loophole."[21] In re-authorizing VAWA in 2013, Congress specifically identified the loss of tribal criminal prosecutorial power over non-Indian crimes on tribal lands as a major contributing factor to the incredibly high rates of violence perpetrated against Native women. As Senator Tom Udall explained:

Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7, 94 Stat. 317, 320-21 (1980) (codified as amended at 25 U.S.C. § 766 (2006)); Act of May 31, 1946, ch. 279, 60 Stat. 229; Confederated Salish and Kootenai Tribes, Montana; Acceptance of Retrocession of Jurisdiction, 60 Fed. Reg. 33,318 (June 9, 1995).

[20] *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 508-13 (1976).

[21] 159 Cong. Rec. S480-02, S488 (daily ed. February 7, 2013) (statement of Sen. Tom Udall).

> Here is the problem: Tribal governments are unable to prosecute non-Indians for domestic violence crimes. They have no authority over these crimes against Native American spouses or partners within their own tribal lands. . . .
>
> Non-Indian perpetrators often go unpunished. Yet over 50 percent of Native women are married to non-Indians, and 76 percent of the overall population living on tribal lands is non-Indian.
>
> The result is an escalating cycle of violence. On some tribal lands, the homicide rate for Native women is up to 10 times the national average—10 times the national average. . . .
>
> Native women should not be abandoned to a jurisdictional loophole. In effect, these women are living in a prosecution-free zone. The tribal provisions in VAWA will provide a remedy.

159 Cong. Rec. S480-02, S488 (daily ed. February 7, 2013) (statement of Sen. Tom Udall). And as Representative Sheila Jackson Lee of Texas noted:

> VAWA Reauthorization closes jurisdictional loopholes to ensure that those who commit domestic violence in Indian country do not escape justice. The bill addresses a gaping jurisdictional hole by giving tribal courts concurrent jurisdiction over Indian and non-Indian defendants who commit domestic violence offenses against an Indian in Indian country.

159 Cong. Rec. E217-03, E218 (daily ed. Feb. 28, 2013) (statement of Rep. Jackson Lee). To be sure, VAWA

2013's restoration of tribal jurisdiction over non-Indian domestic violence offenders constitutes a significant, and important, step to fully restoring the inherent right of Tribal Nations to protect their women and children.

Other obstacles limiting the ability of Tribal Nations to effectively address crime in Indian Country, however, remain. Even where Tribal Nations may exercise jurisdiction over a crime, federal law currently precludes their ability to impose meaningful, substantive penalties, leaving the U.S. Attorney the only prosecutor with the authority to impose a sufficient sentence for serious criminal conduct. *See, e.g.*, U.S. Dep't of Justice Memorandum For United States States Attorneys With Districts Containing Indian Country (Jan. 11, 2010), https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country (noting that under current federal law, "in much of Indian Country, the Justice Department alone has the authority to seek a conviction that carries an appropriate potential sentence when a serious crime has been committed").

The Indian Civil Rights Act ("ICRA") prohibits Tribal Courts from imposing a prison term greater than one year for any criminal offense, including domestic violence. 25 U.S.C. § 1302(a)(7) (2006).[22] And as this

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[22] In 2010, Congress passed, and the President signed into law, the Tribal Law and Order Act ("TLOA"). The TLOA amended the Indian Civil Rights Act to provide that Tribal Courts may impose sentences of up to three years of imprisonment for any one offense if certain requirements are met. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2279-80 (codified at 25 U.S.C. § 1302). To date, very few Tribes have been able to implement the full enhanced sentencing authority conditionally granted in the TLOA.

Court noted in *Bryant*, in the context of domestic violence, "a year's imprisonment per offense . . . [is] insufficient to deter repeated and escalating abuse." *United States v. Bryant*, 136 S.Ct. 1954, 1961 (2016); *see also* S. Rep. 111-93, 55 (Oct. 29, 2009) (accompanying S. 797, "'The lack of a system of graduated sanctions through tribal court . . . directly contributes to the escalation of adult and juvenile criminal activity.'") (quoting Former U.S. Attorney General Janet Reno).

These stringent sentencing limitations imposed on Tribal Nations, and the jurisdictional maze catalogued above, give the dual sovereign doctrine heightened importance to securing safety for Native women and children.

C. Overturning The "Separate Sovereigns" Exception In The Federal-Tribal Context Would Undermine Safety And Justice.

The eradication of the "separate sovereigns" doctrine, therefore, would prevent the effective prosecution of violent crimes committed against Native women and children. Without the "separate sovereigns" exception to the Double Jeopardy Clause, Tribes throughout Indian country will be forced to choose between: (1) waiting to see whether federal charges will be filed to allow for a meaningful sentence that matches the severity of the crime and thus risk losing the possibility of a subsequent tribal charge in the event a federal declination comes after the tribal statute of limitations has passed; or (2) bringing tribal charges to ensure some sort of redress, thereby preventing federal prosecution and sufficient sentencing to prevent repeated or future violent crimes committed by the same, or additional, offenders.

As described above, there are some instances where Tribes are better equipped to literally remove a violent offender off the street and prevent continuing or escalating violence. On the other hand, given the jurisdictional and sentencing limitations imposed on Tribal Courts, the U.S. Attorney will, in some instances, be better able to secure a sentence that reflects the gravity of the crime committed, and ultimately, secure the deterrence necessary to ensure safety for a Native victim of domestic violence or sexual assault.

Despite the complexity of the jurisdictional maze and limitations imposed on their sentencing authority, Tribal Nations have remained committed to protecting their communities. Indeed, this is one of the most fundamental things that a government does.[23] In this regard, tribal authorities have worked with federal authorities to develop strategies and collaborations to secure justice for Native victims. Accordingly, coordination between federal and tribal governments is essential to effective law enforcement in Indian country. As the Deputy U.S. Attorney General noted in recent years, "[m]any sexual assault cases arising in Indian Country require a team investigative effort involving

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[23] As Dean Kevin Washburn of the University of Iowa explained in his seminal law review article *Indians, Crime, and the Law*, "In the United States, criminal justice is an inherently local activity as a matter of constitutional design; American criminal justice systems are carefully designed to empower local communities to solve internal problems and to restore peace and harmony in the community." Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 713 (2006). Justice at the tribal level is an important expression of the community's norms and its condemnation when those norms are breached. Federal prosecutions in an often distant court by outsiders, therefore, simply cannot provide the same sense of justice for the community. *See id.*

FBI, tribal police, and BIA. Successful multijurisdictional investigations and prosecutions also require a collaborative working relationship."[24]

This collaboration is key because investigations undertaken exclusively by the federal government, in Indian country, often take a long time. There are often very few FBI agents assigned to a particular reservation, and their office may be a considerable distance away. Some of the challenges FBI agents may face have been explained by Dean Washburn:

> On rural parts of reservations that are accessed by dirt roads without street signs or visible addresses on the homes, however, effective investigation may require significant local knowledge of homes and other locations. It may also require some knowledge of family ties and social networks in the community. Because Indian communities are often relatively closed to strangers, federal law enforcement officers such as FBI agents face a significant handicap.[25]

The problem of delay during the course of a federal investigation is further exacerbated when federal and tribal prosecutors do *not* collaborate, as evidenced in the testimony of M. Brent Leonhard, Deputy Attorney General of the Confederated Tribes of the Umatilla Indian Reservation, before the Senate Committee on Indian Affairs. Leonhard testified concerning a 2007

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[24] Memorandum For United States States Attorneys With Districts Containing Indian Country (Jan. 11, 2010), https://www.justice.gov/archives/dag/memorandum-united-states-attorneys-districts-containing-indian-country

[25] Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 713 (2006).

case from the Crow Nation involving the sexual molestation of a six-year-old girl. The federal prosecutors ultimately declined to prosecute the case, but not before the tribal statute of limitations had run. The victim not only had to wait for the federal prosecutors to make a decision, but then ultimately had no recourse at all. *See Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing before the Senate Comm. On Indian Affairs*, 110th Cong. 683 (2008) (statement of M. Brent Leonhard).

In contrast, the Indian Law and Order Commission, an intergovernmental body created by the Tribal Law and Order Act of 2010, Pub. L. 111-211 (TLOA), recorded an example of the success, and increased safety, that comes with interjurisdictional coordination. As the Commission's final report, published in May 2015, noted:

> Even the most basic forms of interjurisdictional cooperation can save money and lives. For example, on the Ute Mountain Ute Reservation in Colorado, the late Chairman Ernest House, Sr. fought back when violence threatened to overwhelm his community. In 2005-06, reported homicide rates on the Ute Mountain Ute Reservation ranged between 250 and 300 per 100,000 people, as compared to a statewide rate of 4 out of 100,000. Stated another way, had the city of Denver experienced the same homicide rates as the Ute Mountain Indian Reservation, Denver would have had more than 1,900 murders instead of the 144 that actually occurred.
>
> In response, Chairman House convened the Ute Mountain Ute Law Enforcement Working Group, chaired by Gary Hayes, who was then

> Tribal Council vice chair. The working group met at least monthly to prevent and combat crime. This group quickly gained momentum and began focusing on better coordination across jurisdictional lines. . . . According to Mr. Hayes, who is now chairman, violent crimes rates have fallen in virtually every major category, and the reservation experienced just one homicide in the past two years. "Working together is saving our people," he said.[26]

The eradication of the "separate sovereigns" doctrine, however, would require a Tribal Nation to choose whether to prosecute a case before the conclusion of the investigation that determines whether the U.S. Attorney will prosecute. And if the Tribal Nation elects to prosecute prior to the expiration of the tribal statute of limitations—and prior to the conclusion of the federal investigation—without the "separate sovereigns" exception, the tribal prosecution would preclude the more meaningful and deterrent sentencing authorized under federal jurisdiction.

And if a Tribal Nation elects to forego prosecution, in the hopes that the U.S. Attorney will conclude his or her investigation and bring federal charges, the victim may face a situation where no charges are brought at all—as federal prosecution is never guaranteed. *See Tribal Courts and The Administration of Justice in Indian Country Hearing Before the Senate Comm. On Indian Affairs*, 110th Cong. 576 (2008)

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[26] Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer, Report to the President and Congress of the United States* 113 (November 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf

(statement of Sen. Byron L. Dorgan) ("in the four years from 2004 to 2007, the United States Government declined to prosecute an average of 62 percent of reservation crimes. This means that nearly 75 percent of adult and child sex crimes and 50 percent of reservation homicides, went unpunished in the Federal system.").

Failure to prosecute crimes committed against Native women and children is not without consequence. Prosecution is indispensable to addressing the repetitive nature of domestic violence. As the NIJ has reported, "prosecution deters domestic violence if it adequately addresses abuser risk by imposing appropriately intrusive sentences."[27] Furthermore, the repetitive nature of domestic violence means that violence increases in severity with each repeated act of abuse. *See United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014) ("Domestic violence often escalates in severity over time. . . . "). Thus, when no intervention occurs, a victim typically experiences an ever-increasing severity of violence.[28] Even when domestic violence victims are able to escape the relationship, the likelihood of additional violence increases.[29] The risk of lethal violence is particularly salient; spouses and partners commit a significant portion

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[27] *See, e.g.*, Andre R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* 47 (2008), http://niccsa.org/uploads/file/2da34f8956824cc8882578ca88ad8a60/PRACTICALIMPLICATIONSOFCURRENTDOMESTICVIOLENCERESEARCH.pdf.

[28] Matthew Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 West. State Univ. L. Rev. 173, 184-185 (2007).

[29] Ruth E. Fleury et al., *When Ending the Relationship Doesn't End the Violence*, 6 Violence Against Women 1363, 1364 (2000).

(thirty percent) of all homicides of women.[30] For Native women, this number is much higher; as Congress noted in 2005, "Homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and . . . *75 percent of those deaths were committed by a family member or acquaintance*." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain), 2005 WL 1106816 (Westlaw) (emphasis added).

Tribal-federal coordination in investigating and prosecuting crimes committed against Native women and children is, therefore, critical. This coordination is facilitated by the dual sovereignty doctrine, which allows both sovereigns to share information and collaborate without foregoing the ability to prosecute the case in their own court. Continued coordination, therefore, is predicated on this Court's continued recognition of the United States' and Tribal Nations' separate sovereign prosecutorial and sentencing authorities. Forcing Tribal Nations to choose between effective prosecution and sentencing, or risking no prosecution at all, places Tribal Nations in a Catch-22 that would not serve a constitutional purpose under the Double Jeopardy Clause, and ultimately, would only put the safety, health, and welfare of Native women and children in even greater danger.

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[30] *See* Lawrence Greenfeld et al., U.S. Dep't of Justice, NCJ-167237, *Violence by Intimates* 6 (1998), http://bjs.gov/content/ pub/pdf/vi.pdf. In fact, physical violence is the "primary risk factor for intimate partner femicide." Jane Koziol-McLain et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Public Health 1089, 1091 (2003).

D. The "Separate Sovereigns" Exception, As Applied To Tribal Court Prosecutions, Should Not Be Disturbed.

As this Court has previously held, "the dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government." *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, "[w]hen a single act violates the peace and dignity of two sovereigns by breaking the laws of each, [the defendant] has committed two distinct offences." *Id.*; *see also Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("[O]ffences falling within the competency of different authorities to restrain or punish them" are properly "subjected to the consequences which those authorities might ordain and affix to their perpetration").

Accordingly, in the context of dual federal and tribal prosecutions, this Court has determined that "prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *United States v. Wheeler*, 435 U.S. 313, 317 (1978) (quoting Double Jeopardy Clause). For instance, in considering a federal prosecution of a Navajo Nation citizen that followed a criminal prosecution by the Navajo Nation, the Supreme Court determined that the Double Jeopardy Clause in no way prohibited the subsequent federal prosecution. *See id.* Instead, this Court concluded that "[s]ince tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." *Wheeler*, 435 U.S. at 329-30 (quoting Double Jeopardy Clause).

In the tribal context, accordingly, the "separate sovereigns" doctrine affirms and preserves the inherent sovereignty of Tribal Nations to prosecute crimes committed against their own citizens on tribal lands—regardless of what actions another sovereign may or may not take with regards to the same or similar crime. The preservation of both sovereigns' ability to prosecute, as demonstrated above, is critical to ensuring safety for Native women and children. The aforementioned collaborations between U.S. Attorneys and Tribal Prosecutors would not be possible if the Double Jeopardy Clause were suddenly applicable to Tribal Court prosecutions.

II. Petitioner Provides No Sound Basis Or Rationale For The Eradication Of The "Separate Sovereigns" Doctrine.

Petitioner's broad arguments against the doctrine's legitimate constitutional underpinnings overlook the doctrine's application to Tribal Court prosecutions, and consequently, do not support the eradication of the doctrine in its entirety.

A. The Incorporation Of The Bill Of Rights Bears No Constitutional Relevance To The Application Of The "Separate Sovereigns" Doctrine To Tribal Prosecutions.

Again, Petitioner's attacks on the constitutional legitimacy of the "separate sovereigns" doctrine bear no relevance to its application to Tribal Court prosecutions.

First, Petitioner asserts that the "separate sovereigns" doctrine should be eradicated because the exception "was built on a jurisprudential foundation

that crumbled when the Double Jeopardy Clause was incorporated against the states." Pet'r's Br. 31. Petitioner's argument, however, assumes that the doctrine's constitutional underpinnings rely on the exclusive recognition of two sovereigns: the States and the United States. It does not. Time and time again, this Court, as well as numerous other federal courts, have affirmed the doctrine's application to Tribal Court prosecutions. *See, e.g.*, *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1872 (2016) (affirming the application of the "separate sovereigns" exception to tribal court prosecutions because "[a] tribal prosecution . . . is attributable in no way to any delegation . . . of federal authority[,] . . . . [a]nd that alone is what matters for the double jeopardy inquiry.") (internal quotation marks and citation omitted).

And, to be sure, the entirety of the "separate sovereigns" doctrine did not crumble when this Court, in 1967, incorporated the Bill of Rights against the States. Instead, the "separate sovereigns" doctrine, as applied to Tribal Court prosecutions, recognizes the inherent sovereignty of Tribal Nations to make their own laws and be guided by them—a sovereignty that pre-dates not only the incorporation of the Bill of Rights against the States, but also the passage of the Bill of Rights, and even the formation of the United States.

As this Court affirmed just two terms ago, Tribal Nations constitute "separate sovereigns pre-existing the Constitution," and as such, "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Bryant*, 136 S.Ct. at 1962 (internal quotation marks and citations omitted). "The Bill of Rights, . . . therefore, does not apply in tribal-court proceedings." *Id.*

The inherent authority of Indian Nations to prescribe their own criminal laws for crimes committed on their lands, therefore, is not constrained by either the Bill of Rights or the Fourteenth Amendment, as neither of their own force apply to Indian Nations. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896); *see also Lara*, 541 U.S. at 205 ("[T]he Constitution does not dictate the metes and bounds of tribal autonomy. . . ."). Rather than being subject to the United States Constitution, Tribal Governments are instead subject to their own Constitutions, and as such, their inherent sovereignty is constrained only by "the supreme legislative authority of the United States." *Talton*, 163 U.S. at 384. Accordingly, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal citations and quotation marks omitted).

In enacting ICRA, "Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57 (citing 25 U.S.C. § 1302). Thus, "[i]n addition to other enumerated protections, ICRA guarantees 'due process of law,' and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment." *Bryant*, 136 S.Ct. at 1962 (quoting 25 U.S.C. § 1302(a)(8), §1303).

And although "ICRA requires tribes to accord all persons within their jurisdiction enumerated rights akin to the federal Bill of Rights" (*Kelsey v. Pope*, Case No. 14-1537, 2016 WL 51243, at *11 (6th Cir. 2016)), Congress elected not to incorporate the Bill of Rights

as a whole and instead "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62.

Congress's incorporation of the Double Jeopardy Clause against Tribal Nations is limited to dual prosecutions by a Tribal Nation and explicitly does not bar subsequent state or federal prosecutions, that is, prosecutions by "separate sovereigns." Congress' election to only preclude double Tribal Court prosecutions in ICRA's requirements, therefore, constitutes a constitutional exercise of Congress's exclusive power over Indian affairs—one with which this Court should not interfere. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Congress' authority over Indian affairs "has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (the Court has "consistently described [Congress' authority] as *plenary and exclusive* to legislate [with] respect to Indian tribes") (internal citations and quotation marks omitted) (emphasis added).

The incorporation of the Bill of Rights against the States, therefore, did not eradicate the constitutional underpinnings for the entirety of the "separate sovereigns" doctrine. Such a conclusion would undermine Congress' exclusive constitutional authority to legislate concerning Tribal Nations, and furthermore, would require this Court to take a myopic view of a doctrine that has never recognized two sovereigns alone. Because Tribal Nations pre-date the United States, the U.S. Constitution, and all of its amendments, the Double Jeopardy Clause in no way prohibits dual

federal and tribal prosecutions. *See, e.g., Wheeler*, 435 U.S. 313 (1978).

B. The Application Of The Separate Sovereigns Doctrine To Tribal Court Prosecutions Does Not Implicate Federalism.

Likewise, Petitioner's arguments that the "separate sovereigns" exception violates fundamental principles of federalism bear no relevance to dual prosecutions by federal and tribal authorities.

Petitioner asserts that the "separate sovereigns" doctrine should be overturned because "[t]he separate-sovereigns exception turns federalism on its head." Pet. Br. 29. That is, according to Petitioner, this Court must do away with "[t]he separate-sovereigns exception" because "[t]he division of power 'between two distinct governments'—state and federal—was designed to afford a 'double security . . . to the rights of the people.'" Pet'r's Br. 29 (quoting The Federalist No. 51 (James Madison). Petitioner's argument, again, wrongfully assumes that the "separate sovereigns" exception was crafted only to address the intersections of criminal prosecutions between two interrelated sovereigns: the United States and the States.

Tribal Nations, however, were not created as a part of the "two distinct governments" system articulated in the Federalist Papers or cemented in the U.S. Constitution. Instead, Tribal Nations constitute "'separate sovereigns pre-existing the Constitution,'" and thus "have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Bryant*, 136 S.Ct. at 1962 (internal citations and quotation marks

omitted); *see also Talton*, 163 U.S. at 383("Indian nations ha[ve] always been considered as distinct, independent political communities . . . .") (citation and quotation marks omitted). As such, neither the Tenth Amendment nor principles of federalism justify the erasure of the "separate sovereigns" exception as applied to Tribal Court prosecutions.

Despite a regrettable history of policies that sought to exterminate tribal governments and their citizens, Indian Nations have survived and remain both sovereign and distinct, a "separate people, with the power of regulating their internal and social relations. . . ." *Kagama*, 118 U.S. at 381–82. One of the attributes of sovereignty that Indian Nations maintain today is the "power to prescribe and enforce internal criminal laws." *Wheeler*, 435 U.S. at 326. And thus "unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form." *Sanchez Valle*, 136 S.Ct. at 1872.

In the federal-tribal context, then, the "separate sovereigns" doctrine is not at odds with federalism, but rather, this Court's well-founded guidance and precedent underscores the manner in which the doctrine has affirmed the historic sovereign-to-sovereign relationship between Tribal Nations and the United States—one that pre-dates the U.S. Constitution and all of its amendments.

C. The "Separate Sovereigns" Exception Recognizes That The "Unique Source" Of Tribal Nations' Criminal Prosecutorial Power Pre-Dates The U.S. Constitution.

Ultimately, Petitioner's broad sweeping attacks on the "separate sovereigns" exception fall short of justifying any eradication of the doctrine in the federal-tribal context.

As this Court recently held, the "separate sovereigns" exception to the Double Jeopardy Clause affirms that "[t]he 'ultimate source' of a tribe's 'power to punish tribal offenders'" constitutes a "pre-existing" sovereignty. *Sanchez Valle*, 136 S.Ct. at 1872 (2016) (quoting *Santa Clara Pueblo*, 436 U.S., at 56. The inherent sovereignty of Tribal Nations, therefore, "is 'attributable in no way to any delegation of federal authority.' . . . [a]nd that alone is what matters for the double jeopardy inquiry." *Sanchez Valle*, 136 S.Ct. at 1872 (quoting *Santa Clara Pueblo*, 436 U.S., at 56 (internal ellipses omitted).

Accordingly, this Court, and numerous lower federal courts, have repeatedly affirmed the pre-existing inherent authority of Tribal Nations to prosecute, as separate sovereigns, the crimes that occur on their lands. For instance, in *United States v. Lara*, this Court reasoned that "the Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign." *Lara*, 541 U.S. at 210 (2004). Because the Spirit Lake Tribe acted in its own capacity as a separate sovereign, "the Double Jeopardy Clause [did] not prohibit the Federal Government from proceeding with" its own "prosecution for a discrete federal offense." *Id.*; *see also United States v Enas*, 255 F.3d 662, 667

(9th Cir. 2001) ("When a tribe exercises inherent power, it flexes its own sovereign muscle, and the dual sovereignty exception to double jeopardy permits federal and tribal prosecutions for the same crime.").

Likewise, this Court has affirmed the importance of preserving the inherent right of Tribal Nations to criminalize and punish crimes committed on tribal lands, since "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government." *Wheeler*, 435 U.S. at 332; *see also id.* ("[T]ribal courts are important mechanisms for protecting significant tribal interests."). Petitioner points to nothing in the U.S. Constitution—or any of its Amendments—that diminishes the inherent authority of Tribal Nations. And as this Court has repeatedly affirmed, "Indian tribes have not given up their full sovereignty." *Id.* at 323.

And although "Congress has in certain ways regulated the manner and extent of the tribal power of self-government[, that] does not mean that Congress is the source of that power." *Id.* at 328. Instead, "this Court has held firm and fast to the view that Congress' power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty." *Sanchez Valle*, 136 S.Ct. at 1863 n.5 (citations omitted); *see also Lara*, 541 U.S. at 204 (affirming Tribal Nations' "authority to control events that occur upon the tribe's own land").

Petitioner has pointed to no act of congressional legislation that, in any way, alters the pre-existing sovereignty of Tribal Nations—or more pointedly, declares the Double Jeopardy Clause applicable to Tribal Court prosecutions. Accordingly, until or unless Congress acts, the "separate sovereigns" exception

remains constitutionally necessary to preserve the inherent "pre-existing" sovereignty of Tribal Nations that this Court has repeatedly affirmed and upheld.

Petitioner's broad-based attack on the "separate sovereigns" doctrine ignores the federal-tribal context. The application of the doctrine in that context rests on independent moorings and plays a critical role in effective law enforcement in Indian country. *Amici* ask that this Court leave the important role that the doctrine plays in Indian country undisturbed.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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No. 17-646

In The Supreme Court of the United States

TERRENCE MARTEZ GAMBLE,
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v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Petitioner in the above-styled case presently before this Court for oral argument.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but written consent was not obtained from Respondent United States.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this

case because the Institute is keenly interested in protecting the civil liberties of individuals from infringement by the government. The issue presented in this case, *i.e.*, whether persons are subject to successive prosecutions by different units of government for the same offense, is one of great importance because the power to conduct successive prosecutions presents a danger of abuse of power by the government that is antithetical to the mandate of U.S. Const. Amend. V that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]"

As a civil liberties organization, The Rutherford Institute and the brief set forth, *infra*, brings a discerning analysis to the issues presented in this case. The Institute specializes in protecting the constitutional rights of individuals and its experience in these matters will bring to light matters which will assist the Court in reaching a just solution to the questions presented.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

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INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 36 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion, or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because it involves the fundamental civil right that persons should not put to the expense, stress and inconvenience of successive prosecutions for the same offense. The Double Jeopardy Clause of the Fifth Amendment was meant to prevent the government from abusing its awesome power to prosecute individuals. Because continuation of the dual sovereignty doctrine makes misuse of this

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[1] No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

power more prevalent and likely, The Rutherford Institute asks that the Court abolish the doctrine.

SUMMARY OF THE ARGUMENT

This Court should overrule the dual sovereignty exception to the Double Jeopardy Clause, as it is incompatible with the text of the Fifth Amendment to the U.S. Constitution. The text offers no exceptions to its protection from successive prosecution for the same conduct, regardless of which sovereign seeks to punish and in what order. Once the Double Jeopardy Clause was incorporated to the States via the Fourteenth Amendment to the U.S. Constitution in *Benton v. Maryland*, 395 U.S. 784 (1969), the Federal Government and the States were barred from engaging in their own successive prosecutions for the same conduct. This principle must apply when two sovereigns seek to engage in successive prosecutions following the prosecution by another. Additionally, the Supremacy Clause of U.S. Const. Art. VI and the Fifth Amendment should procedurally preempt the States from prosecuting conduct proscribed by Congress, thereby ending the dual sovereignty doctrine.

The dual sovereignty exception to the Fifth Amendment's Double Jeopardy Clause unnecessarily enables a system where prosecutors and law enforcement officers can simultaneously work against a defendant on behalf of the Federal and State government and apply overbearing institutional pressure. This has led to simultaneous prosecutions against the same defendants for the same conduct by the same prosecutors and law

enforcement officers. Several sensitive rights remain in constitutional question due to the dual sovereignty exception, including a circuit split related to the Sixth Amendment's right to counsel. This Court's prior decisions concerning the incorporation of the Bill of Rights and the dual sovereignty doctrine reflect the principle that current precedent allowing coordinate governments to accomplish together what neither can do alone may not stand. This applies with equal force to the Double Jeopardy Clause.

ARGUMENT

I. THE DUAL SOVEREIGNTY DOCTRINE IS IN DIRECT CONFLICT WITH FEDERALISM AND ENCOURAGES ABUSE OF POWER.

The "dual sovereignty" doctrine, first recognized in *Fox v. Ohio*, 46 U.S. 410 (1847), stands for the proposition that the Federal Government and the States can successively prosecute an individual for the same conduct without violating the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 435; *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959) ("In a dozen cases decided by this Court between *Moore v. Illinois* [55 U.S. 13 (1852)] and *United States v. Lanza* [260 U.S. 377 (1922)] this Court had occasion to reaffirm the principle first enunciated in *Fox v. Ohio*."). In *Fox*, the Court relied on *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights did not apply to the States. *See Fox*, 46

U.S. at 434–35 ("[The Bill of Rights] are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens."). Two decades later, the United States ratified the Fourteenth Amendment, which lead to the incorporation of several guarantees within the Bill of Rights to the States, including the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784, 787, 794 (1969) ("On the merits, we hold that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment.").

The Double Jeopardy Clause reads: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const., Amend V. It "protects against a second prosecution for the same offense," "against a second prosecution for the offense after conviction," and "against multiple punishments for the same offense." *Albernaz v. United States*, 450 U.S. 333, 343 (1981); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Prior to *Benton*'s incorporation of the Double Jeopardy Clause to the States, every challenge to the dual sovereignty doctrine since the ratification of the Fourteenth Amendment necessarily came as a due process challenge. *See, e.g., Bartkus*, 359 U.S. 121; *Abbate v. United States*, 359 U.S. 187 (1959). Now that the Double Jeopardy Clause applies to both Federal and State prosecution, *Benton v. Maryland*, 395 U.S. at 787, the Court must reconsider these holdings and rule in the alternative, as the bar against successive prosecution is no longer "sovereign specific" but remains offense specific. U.S. Const. Amend V; *see also Blockburger v. United*

States, 284 U.S. 299, 304 (1932) (providing the test as to whether conduct is the "same offense" for purposes of Double Jeopardy: "[if] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

A. The Supremacy Clause and Double Jeopardy Clause Procedurally Preempt States From Prosecuting Individuals For Conduct Proscribed By Congress, Thereby Invalidating The Dual Sovereignty Doctrine.

In our federal system, the United States possesses only limited powers; the States and the People retain the remainder. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) ("The States have broad authority to enact legislation for the public good — what we have often called a 'police power.'"); *United States v. Lopez*, 514 U.S. 549, 567 (1995). The Federal Government has no police power and "can exercise only the powers granted to it," *McCulloch v. Maryland*, 17 U.S. 316 (1819), including the power to prosecute, *id.*, and make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers. *Bond*, 134 S. Ct. at 2086. When Congress enacts criminal law, it does so pursuant to an enumerated power unique from the States, as Congress does not have general police powers. *Id.*; *United States v. Comstock*, 560 U.S. 126, 148 (2010) (citing *Morrison*, 529 U.S. at 618); *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring) ("The

Federal Government has nothing approaching a police power."). Nevertheless, the dual sovereignty doctrine has historically afforded Federal and State governments with autonomy to prosecute for the same conduct. This fundamental "power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers . . . ." *McCulloch*, at 418.

Though they differ from a double jeopardy challenge, several cases have come before this Court to challenge State criminal laws seeking to punish the same conduct as Federal legislation under the preemption doctrine. *See, e.g., California v. Zook*, 336 U.S. 725 (1949) (challenging State power to criminalize conduct proscribed by Federal law). These preemption cases challenged State' authority to enact criminal legislation rather than the State' authority to prosecute, but the jurisprudence serves as a relevant guide when considering the conflict between the States' general police powers and Federal prosecution of laws enacted pursuant to enumerated powers.

Similar to the power to tax, *cf. id.* at 425, the power to punish has been considered one of such "vital importance" that "it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." *Cf. id.* But, akin to the power to tax, the States' independent authority to prosecute must give way to federal

preemption when State action would burden Federal sovereignty. *Cf. id.* at 427 ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."). When applying the Supremacy Clause as preemption to State action, the Court's primary function is to determine whether state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (finding state criminal law to be preempted by federal law). The Fifth Amendment's Double Jeopardy Clause prevents successive punishment for the same offense, therefore State prosecution for the same conduct proscribed by federal law serves as a fundamental "obstacle" to the accomplishment and execution of federal prosecution. It is "of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans." *Id.*

In *California v. Zook*, this Court relied on *Fox*'s dual sovereignty doctrine and considered the issue of preemption as it related to criminal prosecution. 336 U.S. at 731. A California statute prohibited the sale or arrangement of any transportation over the public highways of the State if the carrier had no permit from the federal Interstate Commerce Commission ("I.C.C."). *Id.* at 726–27. The federal Motor Carrier Act had a similar provision. The question was whether the state act was invalid in light of the

federal act. *Id.* Both the California and federal statutes required Zook to sell transportation only in carriers having permits from the I.C.C. Zook was prosecuted under the state act, admitted the unlawful activity, but demurred to the criminal complaint on the sole ground that the state statute entered an exclusive congressional domain. *Id.* at 727. The Court rejected Zook's argument, suggesting that the alternative would erroneously "set aside great numbers of state statutes" in the name of federal preemption because it would be attempting "to satisfy a congressional purpose which would be only the product of th[e] Court's imagination." *Id.* at 732–33. The case currently before the Court raises a materially different question, but the Constitution requires the same outcome that the *Zook* Court imagined—State criminal laws must give way to Federal laws that punish the same conduct because the Double Jeopardy Clause is a procedural bar against successive prosecution for the same offense.

In every preemption case, the Constitutional inquiry dealt with a conflict between State and Federal law, enacted according to Article I of the Constitution. Now the Court must consider a similar, but materially different dichotomy: two sovereigns proscribing the same conduct but bound by the same limitation on successive prosecution.

In this situation, States must be procedurally preempted from prosecuting an individual when the same offense has been proscribed by the United States, as the State voluntarily ceded its general police powers pursuant to Article I, § 8 of the United States Constitution, the Supremacy Clause, and the

Fourteenth Amendment. Prior to the ratification of the Fourteenth Amendment, the Bill of Rights was a limitation on the Federal Government by the States. The Fourteenth Amendment was a fundamental change, acting as a self-imposed limitation on the States, by the States, with the incorporation of the Bill of Rights placing State sovereignty into self-subjugation to federal constitutional standards. *See Benton*, 395 U.S. at 795 ("Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments.").

It has been a "perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947). Since ratification of the Fourteenth Amendment and *Benton*'s incorporation of the Double Jeopardy Clause to the States, the dual sovereignty doctrine has been in direct conflict with the Supremacy Clause and the Fifth Amendment. The Constitution makes a single sovereign responsible for maintaining a comprehensive and unified system to prosecute infractions against the United States when Congress has chosen to proscribe conduct pursuant to its enumerated powers. When Congress does not choose to proscribe this conduct, the States' police powers remain unencumbered.

When considering the interplay between our federal and state criminal justice systems, the Fifth

Amendment's Double Jeopardy Clause must be interpreted as an "actual conflict" between state and federal prosecutions. *Cf. Pacific Gas & Elec. Co. v. State Energy Resources Conservation Development Commn.*, 461 U.S. 190, 204 (1983) ("Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law."). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). When Congress chooses to proscribe conduct pursuant to its enumerated powers—powers which were ceded by the States—the Double Jeopardy Clause bars successive prosecution and the Supremacy Clause bars prosecution by the State altogether.

B. The Dual Sovereignty Doctrine Has Created A Criminal Justice System Ripe For Abuse.

This Court recognized a caveat to the dual sovereignty doctrine in *Bartkus v. Illinois*, suggesting an exception when the state brings its prosecution as merely a tool of the federal authorities who avoid the Fifth Amendment's prohibition against a retrial of a federal prosecution after an acquittal. 359 U.S. at 123–24. Though the Court has never had the opportunity to hold that such an exception actually exists, several other

forms of procedural abuse are plausible via the dual sovereignty doctrine.

1. A circuit split pertaining to the Sixth Amendment's right to counsel is predicated on the dual sovereignty exception to double jeopardy.

The right to counsel set forth in U.S. Const. Amend. VI is considered "offense specific" and is deemed inapplicable when defendants are questioned about conduct for which they have not been charged. *See Texas v. Cobb*, 532 U.S. 162, 173 (2001). The dual sovereignty doctrine has lead to a circuit split as to whether it applies in the context of the Sixth Amendment's right to counsel. *Compare United States v. Burgest*, 519 F.3d 1307 (11th Cir. 2008) (holding that the dual sovereignty doctrine does not apply to the Sixth Amendment's right to counsel because a crime cannot be the "same offense" when proscribed by a separate sovereign); *United States v. Alvarado*, 440 F.3d 191, 194 (4th Cir. 2006) (same); *United States v. Coker*, 433 F.3d 39, 44 (1st Cir. 2005); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002) (same); *with United States v. Mills*, 412 F.3d 325 (2d Cir. 2005) (holding *Cobb* does not require the dual sovereignty doctrine be extended to the definition of an offense in the Sixth Amendment context); *United States v. Red Bird*, 287 F.3d 709, 715 (8th Cir. 2002) (same). By invalidating the dual sovereignty doctrine for the purpose of double jeopardy, the Court has the opportunity to give guidance to the lower circuits as it relates to the Sixth Amendment's right to counsel as well.

2. Centralized prosecution and the threat of simultaneous criminal proceedings run the risk of overbearing a defendant by manipulating the exceptions within a system of dual sovereignty.

Though the *Bartkus* Court addressed the permissibility of a second prosecution by a government other than the one first prosecuting, it did not consider the now-prevalent use of cross-designated Special Assistant United States Attorneys ("SAUSA") or federal-state Joint Task Forces ("JTF"), which handle the investigation and prosecution of the same defendant by separate sovereigns.

The modern paradigm of SAUSAs and JTFs involves cooperation between state and federal forces that share resources between sovereigns. *See* Haley White, *Centralized Prosecution: Cross-Designated Prosecutors and an Unconstitutional Concentration of Power*, 21 Wash & Lee J. Civ. Rts. & Soc. Just. 521 (2015). Because SAUSAs and JTFs involve sovereigns cooperating as equals, they present a distinct set of facts from cases considered in *Bartkus*. In some instances, the same prosecutor and law enforcement officers can simultaneously proceed against the same defendant on behalf of both sovereigns. *Id.*; *see also* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 Law & Soc. Inquiry 239, 247 (2005) (explaining that local prosecutors have the ability to threaten to

bring charges in federal court unless defendant pleads guilty).

A system with traditional limitations provided context for the *Bartkus* Court's analysis of a hypothetical overlap between federal and state authority. As one court noted, "there are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties." *Ex parte Siebold*, 100 U.S. 371, 392–93 (1879). The increase in federal involvement in the criminal justice system is largely be attributed to the expansion of the Commerce Clause of U.S. Const. Art. I, § 8, and this Court has noted that Congress' exercise of power under the commerce clause is analogous to the police power of the states. *Brooks v. United States*, 267 U.S. 432, 436–437 (1925). Proliferation of interstate commerce and subsequent criminal laws addressing these issues increased the interaction between federal and state law enforcement.

In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55-56 (1964), interpreted the extensive interaction between state and federal authorities within the criminal process, as part of an "age of 'cooperative federalism,' [in which] the Federal and State Governments are waging a united form against many types of criminal activity." This has since developed into the creation of SAUSAs and JTFs. The expansion of the federal role in criminal justice has resulted in a myriad federal-state JTFs and hundreds of SAUSAs throughout the nation, each running the risk of overwhelming a defendant

and abusing civil liberties with impunity due to the dual sovereignty doctrine. These abuses appear in the form of the prosecutor's charging and sentencing decisions, plea agreements, evidence gathering, the defendant's access to counsel, his right to effective counsel, and the finality of a verdict.

CONCLUSION

For the foregoing reasons, the Court should overrule the dual sovereignty doctrine and reverse the judgment below.

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No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR TEXAS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MONTANA, NEBRASKA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

This amici curiae brief is submitted by 36 States: Texas, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Amici, which include the 15 most populous States, represent over 86 percent of the country's population. Their elected leaders span the political spectrum and may disagree on policy issues. But each State has a strong interest in its sovereign power to prosecute violations of its laws regardless of the prosecutorial decisions of other sovereigns, whether the federal government or other States.

The significance of criminal prosecution to the States cannot be understated given the States' inherent authority to define and enforce criminal law. *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 128 (1982). This Court has long recognized that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition [cannot] be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Because the doctrinal change that petitioner seeks would weaken the States' ability to exercise their sovereign authority to prosecute violations of their laws, the States have a significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

Petitioner seeks to upend the principle by which a State is not precluded from enforcing its criminal laws vindicating its sovereignty because another sovereign prosecuted the individual under *its* criminal laws for a violation of *its* interests. Denying a State the ability to do so would transform the nature of sovereignty.

I. It has long been understood that the term "offence" in the Double Jeopardy Clause refers not to conduct abstractly viewed as wrong but to a violation of sovereignty—the power to order society through laws. Because the atom of sovereignty is split in our federalist system of government, a violation of state law is a different "offence" than a violation of federal law.

As this Court explained just two Terms ago, the States' status as separate sovereigns is "the most fundamental premise[] of our constitutional order, indeed the very bedrock of our Union." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 n.4 (2016). The States retained inherent attributes of sovereignty upon joining the Union, and a key aspect of that sovereignty is the exercise of their police power to define and prosecute crime. Petitioner's revisionist interpretation of the Double Jeopardy Clause would weaken the States' prerogative to enforce criminal laws for the protection of their citizens, in keeping with the States' duties as sovereigns.

Disregarding the separate sovereignty of the States and the federal government would fail to respect their distinctive interests. History provides examples of how the independent interests of the States and the federal government are brought to bear in criminal enforce-

ment. Differing characteristics of those interests counsel against disrupting that approach. Moreover, petitioner offers no good solution to the problems that his reinterpretation of the Double Jeopardy Clause would create.

II. Petitioner does not identify any compelling reason for this Court to depart from more than a century and a half of precedent consistently recognizing the sovereignty-specific nature of an "offence" under the Double Jeopardy Clause.

Petitioner argues that an expansion of federal criminal law requires abandoning the sovereignty-specific view of an "offence." But the scope of federal law, or of state law, has nothing to do with the interpretive merits of the Court's longstanding view. Hence, the Court has reaffirmed the separate-sovereignty understanding again and again throughout the twentieth century, including the New Deal years and other periods of perceived expansion in federal law. Any complaint about federal overcriminalization can be addressed on its own terms in proper cases about Article I federal power, not by fashioning a new reading of the Double Jeopardy Clause that would weaken the States' sovereignty in exercising their traditional police powers.

The various policy concerns proffered by petitioner also do not warrant reversal of the Court's longstanding precedent. Balancing competing concerns in the context of successive prosecutions is an inherently policy-laden decision, best made by each sovereign in keeping with local values and interests. Different sovereigns can make that policy call in different ways in different contexts, and the panoply of policy decisions made by different

States highlights the folly of adopting petitioner's one-size-fits-all approach.

ARGUMENT

Petitioner asks this Court to overturn more than a century and a half of precedent underlying the "fundamental principle," *Heath*, 474 U.S. at 93, "that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each," *United States v. Lanza*, 260 U.S. 377, 382 (1922). The Court should decline the invitation.

If state sovereignty is to have real meaning, a State must be free to prosecute crimes against its legitimate interests irrespective of the actions of other, separate sovereigns. None of the reasons advanced by petitioner or amici supporting him justify abrogating that fundamental aspect of the States' retained sovereignty.

I. Under Our Federal System Of Retained State Sovereignty, A State Crime Is A Different "Offence" Than A Federal Crime.

An offense is a violation of a sovereign's laws, and the separate-sovereigns doctrine reflects that "the atom of sovereignty" is split in our federal system. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Laws imposing obligations under a State's police powers vindicate that State's retained sovereignty, which exists independently of the federal government's sovereignty. The principle of separate sovereignty is thus the natural outgrowth of our unique system of government, one that has withstood the test of time. Jettisoning that approach for a radical, new-

found understanding of the States and federal government as one collective sovereign, as petitioner would prefer, would lead to a host of problems for which petitioner has no solution.

A. An "offence" is determined with reference to the sovereignty violated.

As the Court has long understood, the term "offence" in the Double Jeopardy Clause, U.S. Const. amend. V, references "the common-law conception of crime as an offense against the sovereignty of the government." *Heath*, 474 U.S. at 88. At the core of sovereignty is the power of government "to govern men and things within the limits of its dominion," whether that dominion be determined based on territory or subject matter. *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (5 How.) 504, 583 (1847) (discussing both state and federal sovereignty). An "offence" is a violation of that sovereignty.

Thus, an "offence" is not merely conduct that a community views as immoral. An "offence" exists only with reference to a law expressing sovereignty: "[A]n offence, in its legal signification, means the transgression *of a law*." *Heath*, 474 U.S. at 88 (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852)) (emphasis added). As Justice Scalia explained in his dissenting opinion in *Grady v. Corbin*, 495 U.S. 508 (1990), which the Court soon thereafter endorsed upon *Grady*'s overruling: "[The Double Jeopardy Clause] protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*. 'Offence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Id.*

at 529 (citing definitions); *see United States v. Dixon*, 509 U.S. 688, 704 (1993); U.S. Br. 10-14.

Consequently, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" *Heath*, 474 U.S. at 88 (quoting *Lanza*, 260 U.S. at 382). Because "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other," it follows naturally that a prosecution by one according to its laws cannot preclude prosecution by the other according to its own laws. *Lanza*, 260 U.S. at 382.

That understanding of an "offence" as linked to sovereignty "finds weighty support in the historical understanding and political realities of the States' role in the federal system." *Heath*, 474 U.S. at 92 (observing that "[t]his Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns"); *accord United States v. Wheeler*, 435 U.S. 313, 318 (1978); *Abbate v. United States*, 359 U.S. 187, 195 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959). That view has been reaffirmed time and again, for over a century and a half. States have relied on it and fashioned laws around it. That firm history "goes a long way in the direction of proving the presence of unassailable ground for [its] constitutionality." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *cf. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) ("If a thing has been practiced for two hundred years by common

consent, it will need a strong case for the Fourteenth Amendment to affect it.") (quotations omitted).

B. The States did not surrender their sovereignty when entering the Union.

1. Under the long-held view of an "offence" as a disregard of sovereign authority, a person who violates both state law and federal law commits two different "offences" because, under our Constitution, the States retain the police powers inherent to sovereignty.

The United States is uniquely composed of States that "entered the [Union] with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *accord* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution ... are reserved to the States."). The Constitution establishes "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring). Thus, the States "are separate sovereigns," not only "from the Federal Government" but "from one another." *Sanchez Valle*, 136 S. Ct. at 1866.

Contrary to the argument of amici curiae supporting petitioner, the States are not comparable to English counties, which never enjoyed the attributes of sovereignty. *Cf.* Constitutional Accountability Ctr. Amicus Br. 9. The American system deliberately departed from the English model: "our structure of federalism ... had no counterpart in England." *United States v. Gillock*, 445 U.S. 360, 369 (1980). Under our unique federal system, "[w]e have here two sovereignties," "capable of dealing with the same subject matter within the same

territory." *Lanza*, 260 U.S. at 382. It follows axiomatically that there often is "concurrent application of state and federal laws." *Abbate*, 359 U.S. at 190. As even critics of the separate-sovereignty principle have long recognized, that was not true in England. *See, e.g.*, Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 316 (1963) ("[T]his is not true in Britain. In that country two sovereigns do not have *territorial* jurisdiction over a crime.").

The Founders understood the bedrock importance of maintaining state sovereignty when establishing our Union. They assured the ratifying States that "State governments would clearly retain all the rights of sovereignty which they before had" and that were not given over to the national government in the Constitution. The Federalist No. 32 (John C. Hamilton ed., 1892). Indeed, even in those areas where the Constitution vested power in the new federal government, there was to remain "concurrent jurisdiction" in nearly all areas, excepting the rare instances where state power was divested by a grant of exclusive federal power. *Id.* ("[T]he rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor . . . is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.").

The "original and unsurrendered sovereignty" of the States, *Moore*, 55 U.S. (14 How.) at 15, specifically includes the power to enact and enforce criminal laws "to guard the lives and health of their citizens," *Thurlow*, 46 U.S. (5 How.) at 582-83. Indeed, a State without po-

lice powers—"that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion," *id.* at 583—can scarcely be called a State. *See Nebbia v. New York*, 291 U.S. 502, 524 (1934) (discussing the States' "sovereign capacity": "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government."); *see also United States v. Morrison*, 529 U.S. 598, 618 (2000) (observing that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims"); The Federalist No. 9 (John C. Hamilton ed., 1892) (noting that the Constitution leaves the States with "very important portions of sovereign power").

In short, the sovereignty violated by a transgression of state law is independent and distinct from the sovereignty violated by a transgression of federal law. State criminal law does not derive from or depend on federal authority. The Court's Double Jeopardy Clause jurisprudence on the States' separate sovereignty follows ineluctably from federalism.

2. A State's inherent sovereignty, existing independent of the federal government, is not diminished because the two sovereigns may sometimes enact coincident criminal prohibitions. Indeed, even the criminal laws of separate nations may sometimes reach the same conduct. That overlap in the reach of the criminal laws of the separate sovereigns does not negate their separate sovereignty. The same goes for the laws of a State and the federal government (or the laws of two States). Even where their criminal laws may prohibit the same

conduct, each sovereign has legitimate interests in vindication of its own authority to order private conduct. Thus, "dual federalism validly recognizes the inherent authority of a sovereign to govern itself." Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 Va. L. Rev. 1769, 1773-74 (1992).

The inherent, retained sovereignty of the States also is not diminished because prosecutors across jurisdictions sometimes cooperate in the enforcement of one another's criminal laws. *Contra* Pet. Br. 41, 44. As a preliminary matter, cooperation between the States and the federal government in criminal matters is hardly new. Over half a century ago, this Court in *Bartkus* noted that the federal prosecutor there "acted in cooperation with state authorities" and observed that such cooperation was "conventional practice between the two sets of prosecutors throughout the country." 359 U.S. at 123.

More fundamentally, petitioner points to no authority establishing that voluntary cooperation somehow cedes sovereignty. It does not. *See, e.g., United States v. X.D.*, 442 F. App'x 832, 833 (4th Cir. 2011) (per curiam) ("Cooperation between sovereigns does not establish that one sovereign has ceded its prosecutorial discretion to the other sovereign."); *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008) (same). Petitioner and amici argue that increased cooperation means that state and federal interests are no longer distinct. *See* Pet. Br. 41-44; Constitutional Accountability Ctr. Amicus Br. 5, 20-21. But that argument fails to respect the sovereign-

ty-based nature of an offense. In the general course, "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition [cannot] be satisfied by another State's enforcement of *its* own laws." *Heath*, 474 U.S. at 93. Whatever choices each government may make about cooperation in particular instances, the States and the federal government always have separate and distinct interests in defining and prosecuting offenses. *See infra* Parts I.C, I.D.

3. Petitioner argues that the sovereignty-based view of a Double Jeopardy Clause "offence" cannot be correct because federalism "was supposed to protect liberty, not destroy it," which petitioner says happened when he was held to account for violating the laws of separate sovereigns. Pet. Br. 29. That argument at once diminishes and confuses the benefits of federalism. In asking to be freed of the natural consequences of our federalist system, it is petitioner who would "turn[] federalism on its head." Pet. Br. 29.

Obeying multiple sovereigns' laws is a normal part of a federalist system of government. In such a system, "[e]very citizen of the United States is also a citizen of a State," and thus "may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either." *Bartkus*, 359 U.S. at 131 (quoting *Moore*, 55 U.S. (14 How.) at 20); *accord United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550-51 (1875) (observing that it is a "natural consequence of a citizenship . . . [to] pay the penalties which each exacts for disobedience to its laws"). The creation and protection of that social contract—that is, "the establishment of laws requiring each citizen to . . . conduct himself" according

to the rules of society—is "the very essence of government." *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 125 (1876). As the price for living in a federalist system whose divided sovereignty generally protects liberty, citizens are confronted with the "background presumption that federal law generally will not interfere" with administration of state law. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) (addressing tax example).

The benefits of federalism do not hinge on the perceptions of those who occasionally feel the bite of its application. *Cf.* Pet. Br. 29. Criminal law operates "for the benefit of society as a whole." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). Although the accused being held to account for his crime against a particular sovereign may resent it, he, too, benefits from laws that provide order to society. One person's liberty from a sovereign's laws can imperil the welfare of others, protected by a sovereign's laws. *See generally* U.S. Const. pmbl. (giving liberty as only one among many purposes of the Constitution, also created to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare"); *see also W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("[T]he Constitution does not recognize an absolute and uncontrollable liberty.").

C. Treating the States and the federal government as a single sovereign fails to respect the legitimate interests of each.

While the States and federal government all battle crime, and are generally open to cooperation in that effort, their sovereign interests have distinctive charac-

teristics that petitioner's view of the Double Jeopardy Clause would not respect.

1. From the perspective of lines of accountability, state prosecution is typically more local to a community. State-level prosecutions often involve actors with accountability mechanisms not present in the federal system, such as elected prosecutors. And the Court has recognized that criminal prosecution is a local institution through which communities govern themselves, allowing them to "shap[e] the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 564 U.S. 211, 221 (2011). As Alexander Hamilton wrote, "the ordinary administration of criminal and civil justice" is the "one transcendent advantage belonging to the province of the State governments," and "contributes, more than any other circumstance, to impressing upon minds of the people affection, esteem, and reverence towards the government." The Federalist No. 17 (John C. Hamilton ed., 1892). The law often incorporates those concepts explicitly, as in death-penalty cases. *E.g.*, *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (jury must "express the conscience of the community on the ultimate question of life or death").

2. State prosecutions under general police powers can also reflect interests broader than those of the federal government, a government of limited powers stemming from targeted grants of authority. Thus, federal crimes often require a link to interstate commerce or

another font of federal authority, in contrast to crimes prohibited under a State's police power.[1]

For instance, dual state and federal interests can exist when state laws protecting bodily integrity overlap with federal civil-rights laws. Take *United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012), where the defendants brutally beat and killed a Hispanic man in their town. *Id.* at 136. The defendants were prosecuted in the state courts of Pennsylvania for various state crimes related to bodily integrity, resulting in acquittals on all but a simple assault charge. *Id.* at 148. The federal government then successfully prosecuted the defendants for a bias crime under the Fair Housing Act. *Id.* at 140. Although the federal government of course shared the State's concern with bodily integrity, its prosecution also reflected the federal government's interest under that Act with equal access to housing. *Id.* As the court of appeals noted in rejecting a double-jeopardy argument, the State and the federal government each decided to prosecute based on facts implicating their own valid interests. *Id.* at 149.

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[1] It is an open question in this Court whether the *Blockburger* element-comparison test applies to a so-called jurisdictional hook in a statute, as to make a federal law requiring proof of a link to interstate commerce but not requiring proof of conduct within a given State a different offense than a state law requiring proof of conduct within a given State but not requiring proof of a link to interstate commerce. *Cf. United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995) (rejecting the defendant's request to treat the jurisdictional element in 18 U.S.C. § 2111 "as purely incidental" for purposes of the *Blockburger* analysis, but noting conflicting authority).

Or consider *United States v. Angleton*, 314 F.3d 767 (5th Cir. 2002), where the defendant was prosecuted on federal murder-for-hire charges after a prior prosecution by Texas on capital murder charges resulted in an acquittal. *Id.* at 769-70. Although both the state and federal government obviously detest murder, the federal law reflects an additional and distinct federal interest in ensuring that "facilit[ies] of interstate . . . commerce" are not used for the commercial solicitation of murder. *See* 18 U.S.C. § 1958. Reflecting the separate sovereignty breached by the defendant's conduct, the federal government was not barred, in a successive prosecution, from vindicating its own sovereignty. A similar dynamic can exist with respect to human trafficking, sex abuse, child exploitation, or fraud affecting government facilities. An act might violate important interests of both a State and the federal government.

Similarly, in the area of financial crimes, a state prosecution might reflect a State's interest in protecting bodily integrity and property, whereas a federal prosecution might reflect additional federal interests related to protecting interstate commerce and financial markets. For example, in *Application of Coulter*, 860 P.2d 51 (Kan. Ct. App. 1993), federal authorities brought charges to vindicate the federal interest in interstate commerce by protecting member institutions of the Federal Reserve System. *Id.* at 53; *see also* 18 U.S.C. § 2113(f). Although the defendant was acquitted of the federal offenses of aiding and abetting bank robbery and assault during a bank robbery, the State of Kansas still had its sovereign interest in the enforcement of its laws protecting property and public safety in

its territory. So, consistent with the State's separate sovereignty, Kansas charged the defendant with violating the State's robbery and assault laws. *Application of Coulter*, 860 P.2d at 53-55. The State's interest in punishing breaches of its own laws was not diminished by the federal government's prosecution reflecting its own sovereign interests.

3. The separate-sovereigns doctrine also allows vindication of sovereign interests despite potential systemic barriers to prosecution in one jurisdiction, as can arise in the context of civil-rights litigation.

Take, for example, the state and federal trials of the police officers involved in the beating of Rodney King.[2] Within two weeks of the beating, state charges were

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[2] Historical examples of challenges in seeking justice for victims of civil-rights abuses are also well known. *See, e.g.*, *United States v. Price*, 383 U.S. 787, 790-92 (1966) (involving the killing of three civil-rights workers by a deputy sheriff and seventeen others in violation of 18 U.S.C. § 242); *Liuzzo v. United States*, 485 F. Supp. 1274, 1276 (E.D. Mich. 1980) (mem. op.) (describing federal prosecutions for the 1965 murder of civil-rights worker Viola Liuzzo, after two state juries failed to convict); *see also United States v. Guest*, 383 U.S. 745, 746-49 (1966) (upholding federal indictment of defendants charged with conspiring to deprive an African-American army officer murdered while traveling through Georgia). Those cases did not easily lend themselves to prosecution by state courts in the first instance: "state and local accountability systems, to the extent they existed, failed." Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649, 663 (1994). Federal civil-rights prosecutions, "in response to official misconduct or private racist violence left unredressed by state or local authorities," were essential to securing constitutional rights. *Id.* at 664.

filed against the officers involved for excessive use of force. Leslie Berger & Tracy Wood, *At Least 4 Officers Indicted in Beating: Police Probe*, L.A. Times, Mar. 15, 1991, at A1. The jury in the state trial acquitted all but one of the defendants. Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. Times, Apr. 30, 1992, at A1. But the decision to transfer venue from Los Angeles County to Ventura County had led to the selection of a jury that was perceived as biased in favor of the police-officer defendants. *See, e.g.*, Charles L. Lindner, *Lesson of the King Case: The Risk of Shuttle Justice*, L.A. Times, Apr. 25, 1993, at M1.

Subsequently, federal prosecutors charged the defendants with violating King's civil rights. A federal jury convicted two of the officers involved. *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994). The federal government was able to seek vindication of its legitimate interests, unhampered by concerns that, in the state criminal-justice system, "[t]he [police] investigators' loyalty to fellow members of the force may make them less than enthusiastic about developing a case against their colleagues." Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 U.C.L.A. L. Rev. 509, 544 (1994). "Because there was no immediate federal intervention in the case, the local authorities had the opportunity to resolve the issues the case represented." *Id.* at 594. "When they were unable to do so, perhaps because the case was taken from the community it most affected, federal authorities intervened." *Id.* But federal intervention "at an earlier point, simply be-

cause the case involved police misconduct, would have sent a devastating message to the community that the local criminal justice system was not capable of accomplishing justice." *Id.* at 594-95. Respecting separate sovereignty helps ensure that prosecutions do not send that message.

4. Wrongly treating the States and the federal government as a single sovereign may also heighten the effects of undue influence in a particular jurisdiction. That could occur in any direction: undue influence in federal decisions impairing legitimate state interests in enforcing state laws, vice versa, or one State's decisions impairing other States' legitimate interests.

As one example, consider *United States v. Barnhart*, 22 F. (10 Sawy.) 285 (C.C.D. Or. 1884). The court there, in applying the separate-sovereignty principle to reject a double-jeopardy challenge to a federal prosecution, noted the existence of prejudice in a community against a Native American victim. *Id.* at 289. The decision foresaw (*id.* at 292) "the special double jeopardy problems therefore posed when a defendant manipulates a jury's democratic composition through race-based peremptory challenges or venue transfers." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 3 (1994). Just as "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there," instances of "[r]acial bias mar[] the integrity of the judicial system and prevent[] the idea of democratic government from becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

Those concerns are not limited to instances of racial bias. They could arise whenever there is the potential for jurors to be improperly influenced or swayed, as with prosecutions in cases of political corruption. Another instance could be human-trafficking crimes. Federal law generally forbids bringing into or harboring in the United States non-citizens who are not authorized to enter or remain in the country. 8 U.S.C. § 1324; *see also id.* § 1328 (immoral purposes); *id.* § 1327 (aiding or assisting unlawful entry). Several States, in turn, prohibit various forms of human trafficking. *E.g.*, Tex. Penal Code § 20.05. The separate-sovereignty principle helps ensure that no one sovereign's charging or sentencing decisions frustrate another sovereign's policy choices about prosecuting violations in that area. For example, in *People v. Halim*, 223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017), the defendant was federally charged with harboring unauthorized entrants, and the charges were resolved with a plea deal. *Id.* at 495. The State of California then successfully charged the defendant with a violation of its anti-human-trafficking statute, allowing the State to vindicate its independent interests in protecting personal liberty. *Id.* at 498.

5. A State's authority to vindicate its sovereignty could also be deprived under petitioner's view when conduct crosses jurisdictional boundaries. For instance, in *State v. McKinney*, 609 N.E.2d 613 (Ohio Ct. App. 1992), McKinney allegedly killed a man and dumped the body in Indiana. *Id.* at 614. McKinney was initially charged with and convicted of murder in Indiana when the victim's body was found there, as Indiana law created a presumption that a murder victim found in Indiana

was killed there. *McKinney v. State*, 553 N.E.2d 860, 861-64 (Ind. Ct. App. 1990). McKinney was convicted in Indiana trial court, but the conviction was reversed by the Indiana appellate court because the jury instructions did not instruct the jury that "that they were permitted, but not required, to infer from the fact that the body was found in Indiana that the victim was murdered [t]here," *id.* at 865, and McKinney created doubt by citing evidence that he had killed the victim in Ohio, not Indiana, *id.* at 862.

The Indiana prosecution terminated without a conviction, and Ohio then charged and convicted McKinney for murder. *McKinney*, 609 N.E.2d at 614. The separate sovereignty of Ohio thus ensured that Ohio had a chance to vindicate its own laws.[3] The alternative could have allowed a murderer to escape justice in both Indiana and Ohio based on Indiana's burden of proof that the crime happened there.

D. Petitioner has no good solution to the problems posed by his proposal to strip away separate sovereignty.

The problems with disregarding the separate sovereignty of the States and the federal government are not easily addressed by solutions proposed by petitioner. A

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[3] Although a separate doctrine "may exist" that allows a successive prosecution where newly unearthed facts were not "discovered despite the exercise of due diligence," *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977), the *McKinney* case cited above did not involve new facts but rather existing evidence and doubt about whether the burden of proof on a territorial element was met.

central premise of petitioner's argument is that the interests of a sovereign that would be barred from prosecuting without the separate-sovereignty doctrine can be served through cooperative efforts between state and federal prosecutors. *See* Pet. Br. 41-44. But cooperation does not always exist or function smoothly in the real world.

1. In reality, federalism is often "uncooperative." As relevant here, "uncooperative federalism" refers to the counterbalance of States that disagree with the way that they believe federal authorities are (or are not) enforcing federal law at any given time. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256 (2009). States often partner with the federal government to combat crime, but that does not mean that their views are always aligned. State and federal laws may themselves reflect different goals or priorities.

To take just one example, following the recent passage of Proposition 64, a Californian possessing 100 kilograms of marijuana intended for sale would face, at a state trial, conviction of a misdemeanor punishable by "imprisonment in a county jail for a period of not more than six months" and "a fine of not more than five hundred dollars." Cal. Health & Safety Code § 11359(b). By contrast, that same Californian would face, at a federal trial, conviction of a felony punishable by five to 40 years in prison and a fine of up to $5 million. 21 U.S.C. § 841(b)(1)(B)(vii). Such "disparity" is a reflection of our unique system of separate sovereigns, in which certain criminal acts will "impinge more seriously on a federal

interest than on a state interest," *Abbate*, 359 U.S. at 195, and vice versa, *Bartkus*, 359 U.S. at 137.

Prosecutors working for each sovereign will presumably choose to prosecute to serve the interests reflected in their respective laws, which may well not reflect the other sovereign's interests. Abandoning the separate-sovereignty principle would remove an important tenet of federalism, since States would be left with the choice to cooperate, attempt to race to the courthouse, or do nothing if federal authorities insisted on being the ones to prosecute.

Although the federal Executive Branch is democratically accountable for decisions, that accountability is to voters across the Nation, not to the States directly or to the voters of any single State. That structure eliminates, as compared to state and local prosecutors, an accountability mechanism for responsiveness to a State's policies. Increasing reliance on prosecution by a detached entity—although a benefit in some instances, *see supra* Part I.C.3—would in the more general course reduce local responsiveness.

Petitioner's view would create troubling results even where one might generally expect cooperation between state and federal prosecutors because of similar interests. For instance, one inevitable outcome of expecting separate sovereigns to pick a single prosecutor is a "race to the courthouse." *Heath*, 474 U.S. at 93. Defendants might even race to plead guilty in the jurisdiction with the most favorable law. "If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure im-

munity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect." *Lanza*, 260 U.S. at 385.[4]

2. It is also unclear what benefit cooperation would reliably provide as between States. Differences in resources and the relative seriousness of offenses between two States' criminal-justice systems are not always obvious. Nor might a State be willing to entrust prosecution to the laws and citizens of a different State. If only one State can prosecute, its actors are not accountable to the other State, since the "enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." *Heath*, 474 U.S. at 93. So there is less incentive to cooperate than when considering federal prosecution.

In any event, mere cooperation between States cannot fully vindicate the States' separate sovereignty. Each State has its own laws to protect its interests in its own

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[4] Petitioner's heavy reliance on a supposed historical rule about foreign prosecutions indicates that, on his view, not even foreign prosecutions would implicate separate "offences" for purposes of the Double Jeopardy Clause. But the possibility of state cooperation with foreign countries is even more nebulous. Federal authorities can engage with foreign countries diplomatically to decide which sovereign will prosecute. States cannot have that diplomatic engagement with foreign countries. That fact puts the States at a particular disadvantage because it removes them from the decisionmaking process. *Cf., e.g.*, Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 Tex. Int'l L.J. 527, 542-43 (2003) ("The American people expect that certain decisions affecting them will be made through specified constitutional processes by people who are accountable to them.").

way, and the balance struck by one State cannot vindicate—and therefore cannot bar—the actions of another State. *See id.* For example, in *Heath*, a defendant who conspired to have his wife murdered by hired assassins could have escaped justice in one State by pleading guilty in another State. *Id.* But separate sovereignty allowed Alabama to vindicate its interests and express the community's opprobrium through a death sentence, when it otherwise could not have done so given the defendant's guilty plea in Georgia. *See id.* at 83-86, 92.

Numerous examples demonstrate how States use their powers to prosecute offenses to vindicate differing interests—which petitioner seeks to undo. Consider *State v. Ellis*, 656 A.2d 25 (N.J. Super. Ct. App. Div. 1995), in which the defendant abducted the victim in New York and held the victim in New Jersey. *Id.* at 32-33. Under New York and New Jersey law, kidnapping was a continuing offense, whose elements overlapped.[5]

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[5] The New York statute of which defendant was convicted provided that "[a] person is guilty of kidnapping in the second degree when he abducts another person." *Ellis*, 656 A.2d at 34 (citing N.Y. Penal Law § 135.20). "Abducts" was defined as "restrain[ing] a person with intent to prevent his liberation by . . . using or threatening to use deadly physical force." *Id.* (quoting N.Y. Penal Law § 135.00(2)). The New Jersey statute provided that "[a] person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:"

> (1) To facilitate commission of any crime or flight thereafter;

The New York prosecution would not have allowed New Jersey to vindicate its interests because the factual basis for the New York prosecution was the victim's abduction, while the New Jersey prosecution was based on the victim's confinement. *Id.* at 34. Separate sovereignty thus allowed New York and New Jersey to vindicate their interests in prosecuting the same continuing conduct. *Id.* at 32-34.

Another example is *State v. Smith*, 575 N.E.2d 1231 (Ohio Mun. 1991), where the defendant was charged with driving under the influence in Ohio. *Id.* at 1231. The defendant unsuccessfully moved to dismiss the charge because he had already been tried and convicted of driving under the influence in Kentucky for the same conduct. *Id.* Applied in that case, the separate-sovereignty doctrine reflects that both Ohio and Kentucky have a legitimate state interest in maintaining peace and order within their borders.

II. Petitioner And The Amici Curiae Supporting Him Offer No Sound Reason To Discard The Centuries-Old, Sovereignty-Specific Understanding Of An "Offence."

Petitioner offers no good reason to reconsider the Court's long and unbroken line of precedent holding that an offense under the Double Jeopardy Clause is determined with reference to the sovereignty violated.

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(2) To inflict bodily injury on or to terrorize the victim or another.

Id. (quoting N.J. Stat. § 2C:13-1(b)).

A. The scope of federal criminal law does not warrant reconsideration of the separate-sovereignty principle.

Petitioner and amici curiae supporting him argue for rejection of the separate-sovereignty principle because of a perceived "tectonic shift[]" in criminal enforcement to the national government, in the form of a "bloated" federal criminal code. Pet Br. 42-43; Constitutional Accountability Ctr. Amicus Br. 16-23. But nothing about the scope of federal law affects the interpretive merits of the sovereignty-specific view of an "offence." Hence, the Court has consistently reaffirmed that sovereignty-based view over decades, including periods seeing marked growth in federal criminal law. *See, e.g.*, *Federal Coöperation in Criminal Law Enforcement*, 48 Harv. L. Rev. 489, 490 (1935) (noting New Deal-era federal criminal legislation).

Any objection to "hyperfederaliz[ation]" of criminal law, Hatch Amicus Br. 4, should be confronted directly in adjudicating the scope of Article I federal powers. It should not be used as window dressing for a reinterpretation of the Double Jeopardy Clause that would limit and thereby weaken the States' police powers to prosecute crime. Petitioner's view would do just that. In the words of Justice Frankfurter, "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Bartkus*, 359 U.S. at 137.

Indeed, petitioner's revision of the Double Jeopardy Clause could lead the federal government to exercise its preemption authority more often, further diminishing

the States' police powers. Again, the reaction to a perceived federal intrusion into state matters should not be to incentivize a weakening of state power.

B. Petitioner's policy objections can be addressed by legislatures, which have adopted a number of reticulated policies to regulate successive prosecutions.

All States respect the burdens that a successive prosecution imposes on an accused. At the same time, the States must weigh their independent interests in vindicating their own criminal laws. *See supra* Part I.B. Those policy concerns can, of course, come into tension in particular cases. As with many matters on which reasonable minds can differ, "considerable disagreement exists about how best to accomplish" a fair balancing of those competing considerations. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). It is precisely in situations such as those, "where the best solution is far from clear," that the "theory and utility of our federalism are revealed." *Id.*; *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

And it is precisely because that balance turns on the facts of particular prosecutions that this Court should avoid categorical prohibitions and, instead, allow the political branches to adopt context-sensitive approaches tailored to specific cases and local policies. One benefit of the separate-sovereignty doctrine is allowing individual sovereigns to tailor their prosecutorial decisions to the preferences of their community. *See supra* Parts I.C, I.D. Our federalist system has long allowed States

the sovereignty to make that type of decision for themselves. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("[A] state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State.") (citation omitted); *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926) ("[State officials] are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done."); *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469, 548 (1833) ("[T]he legislature possess all the legislative power that the body politic could confer, except so far as they are restricted by the [Constitution] itself.").

The federal government and many of the States already limit successive prosecutions through statutes or formal policies. For its part, the federal government has long maintained a policy by which, with certain specific exceptions, it will not initiate a federal prosecution "following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)." Offices of the U.S. Att'ys, U.S. Dep't of Justice, *Justice Manual* § 9-2.031 (updated 2009), https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-matters prior-approvals. That policy "allows the federal government to bring a successive prosecution only when there are compelling reasons to do so and the prosecuting attorney obtains prior approval from the appropriate United States Assistant Attorney General." *Double Jeopardy*, 44 Geo. L.J. Ann. Rev. Crim. Pro. 522, 552 (2015).

The States have taken a wide variety of approaches. Thirty-five States have some type of statutory con-

straint on their ability to prosecute a crime adjudicated by a separate sovereign.[6] Of these, thirteen states have restrictions for specifically enumerated crimes.[7] Many of those restrictions concern prior prosecutions related to the Uniform Controlled Substances Act or other drug crimes.[8] Others do not.[9]

The variety of state approaches to successive prosecutions shows the inherently policy-laden nature of those prosecutorial decisions. Some States bar a subse-

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[6] *See* Ark. Code §§ 5-1-114, 5-64-418; Cal. Penal Code §§ 656, 793; Colo. Rev. Stat. § 18-1-303; Del. Code tit. 11, § 209; Ga. Code § 16-1-8(c); Haw. Rev. Stat. § 701-112; Idaho Code § 19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code § 35-41-4-5; Iowa Code § 124.405; Kan. Stat. § 21-5110; Ky. Rev. Stat. § 505.050; Mich. Comp. Laws §§ 333.7409, 767.64; Minn. Stat. § 609.045; Miss. Code § 99-11-27; Mont. Code § 46-11-504; Neb. Rev. Stat. § 28-427; Nev. Rev. Stat. § 171.070; N.J. Stat. § 2C:1-11; N.M. Stat. § 30-31-27; N.Y. Code Crim. Proc. § 40.20(2)(f); N.C. Gen. Stat. § 90-97; N.D. Cent. Code § 19-03.1-28; Ohio Rev. Code § 2925.50; Okla. Stat. tit. 63, § 2-413; Or. Rev. Stat. §§ 475.265, 475B.389; 18 Pa. Stat. and Cons. Stat. § 111; 21 R.I. Gen. Laws § 21-28-4.12; S.C. Code § 44-53-410; Utah Code § 76-1-404; Va. Code § 19.2-294; Wash. Rev. Code § 10.43.040; W. Va. Code § 60A-4-405; Wisc. Stat. §§ 939.71, 961.45; Wyo. Stat. § 35-7-1035.

[7] *See* Iowa Code § 124.405; Mich. Comp. Laws §§ 333.7409, 767.64; Neb. Rev. Stat. § 28-427; N.M. Stat. § 30-31-27; N.C. Gen. Stat. § 90-97; N.D. Cent. Code § 19-03.1-28; Ohio Rev. Code § 2925.50; Okla. Stat. tit. 63, § 2-413; Or. Rev. Stat. §§ 475.265, 475B.389; 21 R.I. Gen. Laws § 21-28-4.12; S.C. Code § 44-53-410; W. Va. Code § 60A-4-405; Wyo. Stat. § 35-7-1035.

[8] *See, e.g.*, Iowa Code § 124.405; Mich. Comp. Laws § 333.7409; Neb. Rev. Stat. § 28-427; N.M. Stat. § 30-31-27.

[9] *See, e.g.*, Mich. Comp. Laws § 767.64 (theft).

quent prosecution unless the statutory elements require different facts to be proved.[10] Some States allow a prosecution only if the statutes are aimed at separate evils.[11] One State allows prosecution in either of those scenarios, or if the second offense was not consummated when the former trial began.[12] One State prohibits prosecution only if the two statutes' elements are identical.[13] Another State prohibits prosecution only when there was a prior federal prosecution, with an exception for terrorism charges.[14] And still another State sweeps broader, extending its prohibition to prior adjudications in other countries, so long as the defendant was in fact punished.[15]

In short, the States have a multiplicity of approaches to balancing the conflicting policy concerns in this context. Removing that policy-laden issue from legislatures, who can make context-dependent determinations based on the characteristics of specific prosecutions, is unwarranted.

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[10] *See* Ark. Code § 5-1-114; Colo. Rev. Stat. § 18-1-303; Del. Code tit. 11, § 209; Ga. Code § 16-1-8(c); Haw. Rev. Stat. § 701-112; 720 Ill. Comp. Stat. 5/3-4(c); Kan. Stat. § 21-5110; Ky. Rev. Stat. § 505.050; N.Y. Code Crim. Proc. § 40.20(2)(f); 18 Pa. Stat. and Cons. Stat. § 111; Wisc. Stat. § 939.71.

[11] *See, e.g.*, Haw. Rev. Stat. § 701-112.

[12] *See* N.J. Stat. 2C:1-11.

[13] *See* Minn. Stat. § 609.045.

[14] *See* Va. Code § 19.2-294.

[15] *See* Wash. Rev. Code § 10.43.040.

CONCLUSION

The Court should affirm the judgment below.

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No. 17-646

IN THE
Supreme Court of the United States

TERANCE MARTEZ GAMBLE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE U.S. NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION, U.S. COAST GUARD OFFICE OF MEMBER ADVOCACY AND LEGAL ASSISTANCE—APPELLATE DEFENSE, U.S. AIR FORCE APPELLATE DEFENSE DIVISION, AND U.S. ARMY DEFENSE APPELLATE DIVISION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The United States Navy-Marine Corps Appellate Defense Division, United States Coast Guard Office of Member Advocacy and Legal Assistance—Appellate Defense, United States Air Force Appellate Defense Division, and United States Army Defense Appellate Division, represented more than 1,845 military members and others tried by court-martial in the last fiscal year alone.[2]

Some, like Navy Petty Officer Austin Greening[3] and Retired Army Master Sergeant Timothy Hennis, were convicted at court-martial for offenses first tried in state court under the separate-sovereigns exception to the Double Jeopardy Clause—in Hennis' case, he was sentenced to death *after* acquittal by a state jury.[4]

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[1] Counsel for all parties have consented to filing of this brief. In accordance with Supreme Court Rules 37.4 and 37.6, *amici curiae* are authorized legal representatives of their respective Appellate Defense units, and are authorized by law to appear before this Court under 10 U.S.C. § 870(c) (2012).

[2] CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT FOR THE PERIOD OCTOBER 1, 2016 TO SEPTEMBER 30, 2017, at 46, 106, 115, 134, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY17AnnualReport.pdf.

[3] *United States v. Greening*, No. 201700040, 2018 WL 154779 (N-M. Ct. Crim. App. Mar. 30, 2018), *rev. granted*, __M.J.__ (C.A.A.F. July 24, 2018). The Navy tried Petty Officer Greening for "involuntary manslaughter and obstruction of justice" after he "pleaded guilty to involuntary manslaughter" in an "agreement with the Commonwealth [of Virginia]". *Id.* at *1, *4. The Court of Appeals for the Armed Forces ("CAAF") granted review on the Double Jeopardy issue raised here by Mr. Gamble.

[4] *United States v. Hennis*, 75 M.J. 796, 802-03 (A. Ct. Crim. App. 2016). The CAAF will review this case per 10 U.S.C. § 867(a).

Amici ask this Court to overrule the separate-sovereigns exception so those who served our country receive the proper Double Jeopardy protections of the Constitution, our basic charter of rights to which they took an oath to defend with their lives.

SUMMARY OF ARGUMENT

For the millions of active duty military members,[5] active duty retirees,[6] and others subject to the Uniform Code of Military Justice ("UCMJ"),[7] the separate-sovereigns exception not only allows another "bite at the apple" after a state trial: it slices the apple into "bite sized" pieces for the government. This is because the separate-sovereigns exception allows the military to overrule the verdict of a state jury, with its jurors selected from a representative cross-section of the community, by meeting a lesser standard: currently a two-thirds majority vote for conviction by a panel of military members, each senior to the defendant and picked by the defendant's commander.[8] And the military does this at the discretion of *non-attorney* commanding officers, unconstrained by any restrictions comparable to the *Petite* Policy regulating

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[5] Congress authorized an active duty military of 1,305,900 personnel. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, Pub. L. No. 114-328, § 401, 130 Stat. 2000, 2091 (2016) [hereinafter FY 2017 NDAA].

[6] As of Sept. 30, 2017, there were 1,587,780 non-reservist retirees receiving retired pay. DEP'T OF DEFENSE, FY 2017 DOD Statistical Report on the Military Retirement System at 162 (Jul. 2018), *available at* https://actuary.defense.gov/LinkClick.aspx?fileticket=SsTsvHFcjaE%3D&tabid=1804&portalid=15.

[7] 10 U.S.C. §§ 802, 803 (2012) (listing those subject to UCMJ).

[8] *See id.* §§ 825(c)(1), 825 (d)(1-2), 852(a)(2) (2012).

the United States Department of Justice (DOJ).[9]

Moreover, retired active duty military, and some members of the active duty military suffer a heightened form of the "continuing state of anxiety and insecurity" caused by successive prosecutions.[10] This occurs when the military departments court-martial retirees long after they have left the active duty military, and when they involuntarily extend enlistments beyond the expiration of a service obligation for the sole purpose of carrying out a successive prosecution.[11] The separate-sovereigns exception thus allows the military to hold members at their duty station—often far from a member's home and family, and sometimes in pretrial detention—for a successive court-martial, long after the member has completed his or her contractual service obligation.[12]

Finally, a "factual premise"[13] for use of the

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[9] Brief for the United States in Opposition at 11, *Gamble v. United States*, No. 17-646 (Jan. 2018) (citing Offices of the U.S. Attys, DEP'T OF JUSTICE, *United States Attorneys' Manual* § 9-2.031 (2009), *available at* https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031 [hereinafter *USAM*]).

[10] Brief for Petitioner at 27, *Gamble v. United States*, No. 17-646 (Sept. 4, 2018) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)) [hereinafter Brief for Petitioner].

[11] 10 U.S.C. § 802(a) (2012) (noting that "[m]embers of . . . the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to court-martial).

[12] *E.g.*, *Greening*, 2018 WL 1547779, at *2 (noting that Petty Officer Greening's command informed him of the involuntary extension of his enlistment, "and that the action was taken with a view towards trial by court-martial") (quotation omitted).

[13] Brief for Petitioner at 42.

separate-sovereigns exception to the Double Jeopardy Clause for successive prosecutions at courts-martial—that there is almost no overlap between the state and military judicial systems—is obsolete. The Articles of War governing the Army during and after passage of the Double Jeopardy Clause addressed military offenses not punishable under state law, and required commanding officers to support state jurisdiction over state law offenses. However, the UCMJ now in effect not only proscribes a wide variety of crimes, both military and civil in nature, it allows for court-martial for assimilated violations of federal and state laws. The Framers could not have intended servicemembers to be tried by both a court-martial and a state trial for the same alleged criminal act, as the separate-sovereigns exception has authorized.

ARGUMENT

I. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED BECAUSE IT LOWERS THE GOVERNMENT'S BURDEN BY ALLOWING RETRIAL AT COURT-MARTIAL ON A NON-LAWYER'S DECISION, WITHOUT STATE COURT PROTECTIONS.

Military courts-martial "can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service."[14] "As a result, the jurisdiction" of courts-martial "overlaps substantially with that of

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[14] *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018) (citations omitted).

state . . . courts."[15] This means that a person subject to the UCMJ can "be re-prosecuted by the military" under the separate-sovereigns exception for the same alleged criminal acts—even after a judgement of acquittal by a state court.[16]

Courts-martial for the same alleged criminal acts previously tried in a state court (hereinafter referred to as "successive courts-martial") are poorly regulated. There is no military-wide regulation restricting the ability of military convening authorities—who are the non-lawyer initiators of all courts-martial in the military justice system—to convene a successive court-martial.[17]

Of the different military departments, only the Department of the Navy[18] and the Coast Guard have

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[15] *Ortiz*, 138 S. Ct. at 2170 (citations omitted).

[16] *United States v. Schneider*, 38 M.J. 387, 392 (C.A.A.F. 1993) (citing *Heath v. Alabama*, 474 U.S. 82 (1985)); *see also United States v. Cuellar*, 27 M.J. 50, 55 (C.M.A. 1989) ("[U]ntil Congress legislates to the contrary, a court-martial is not collaterally estopped by the outcome of a trial in a state court."). A previous "federal civilian court" trial "for the same offense" precludes a successive court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 907(b)(2), (2016).

[17] A convening authority is almost always a uniformed officer of the defendant's service. 10 U.S.C. § 822 (2012) (listing civilians and officers authorized to "convene general courts-martial").

[18] *See* DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7F (*hereinafter* "JAGMAN") §§ 0124(c)(1) (2012), *available at* www.jag.navy.mil/library/instructions/JAGMAN2012.pdf (requiring notification of a Navy successive court-martial by the convening authority to OJAG); Letter from Captain Robert P. Monahan Jr., Judge Advocate General's ("JAG") Corps, U.S. Navy, Office of the Judge Advocate General ("OJAG"), U.S. Navy,

centrally tracked their convening authorities' use of successive courts-martial.[19] The Departments of the Army and the Air Force have not centrally tracked use of successive courts-martial. The Department of the Navy—with far less than half of the total number of active duty military members[20]—has conducted roughly two successive courts-martial per year.[21]

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to Lieutenant Daniel Rosinski, JAG Corps, U.S. Navy (Aug. 8, 2018) (on file with counsel of record) [hereinafter Navy Letter].

[19] *See* Letter from Captain V. Tasikas, U.S. Coast Guard, Office of Military Justice, to Lieutenant Salomee Briggs, U.S. Coast Guard (Aug. 21, 2018) (on file with counsel of record) (stating that the Coast Guard only centrally tracked successive court-martial requests between 2007 and February 2016, and that it conducted three successive courts-martial in this time).

[20] Congress authorized an active duty end-strength of 508,900 between the Navy and Marine Corps, out of 1,305,900 total active duty forces. FY 2017 NDAA § 401, 130 Stat. at 2091.

[21] *See* Navy Letter (reporting 42 successive courts-martial between 1992 and 2018, an average of 1.6 courts-martial per year). This figure is an underestimate because it only includes successive courts-martial by Marine Corps convening authorities between 1992 and 2007, when they had to request permission through OJAG. *Compare* DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7D §§ 0124(c)(1) (2004) (on file with counsel of record) and *United States v. Kohut*, 44 M.J. 245, 246-47 (C.A.A.F. 1996) (quoting DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7C §§ 0124(c)(1) (1992) (requiring Marine Corps convening authorities to request permission through OJAG for successive courts-martial)), *with* DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7E §§ 0124(c)(1) (2007), *available at* https://www.newriver.marines.mil/Portals/17/Documents/JAGINST%205800.7E.pdf *and* JAGMAN 5800.7F, *supra* note 18, §§ 0124(c)(1) (only requiring notifications of successive courts-martial within Marine Corps by Marine convening authorities). Since the 2007 JAGMAN change, the Marine Corps has not tracked successive courts-martial by its convening authorities.

Use of the separate-sovereigns exception in successive courts-martial is especially likely to "permit[] the two components of our federal system to conspire together to deprive an individual of liberty where a single government would be powerless to do so."[22] The first reason for this is that convening authorities have a greater chance for conviction in a successive court-martial than the DOJ in a successive prosecution because courts-martial do not provide the jury protections constitutionally required in a prior state trial. The second is that the Department of Defense (DOD) does not sufficiently regulate successive courts-martial to ensure convening authorities use this extreme measure selectively.

A. The lack of a strong jury trial right in courts-martial incentivizes the use of successive courts-martial after a state trial.

Though courts-martial are "judicial" in nature,[23] this Court has not required them to provide the right to a jury trial that the Sixth Amendment guarantees to state court criminal defendants.[24]

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[22] Reply Brief for Petitioner at 8, *Gamble v. United States*, No. 17-646 (Jan. 30, 2018) (citing *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting)) [hereinafter Reply Brief].

[23] *Ortiz*, 138 S. Ct. at 2174 (claiming that the "procedural protections afforded to a service member are virtually the same as those given in a civilian criminal proceeding . . . state or federal"). Courts-martial may afford virtually the same types of procedural protections available in state courts, but in many respects (including the jury right) they are *inferior* protections.

[24] *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury . . . is not applicable to trials by courts-martial.") (citations omitted); *cf. Duncan v. Louisiana*, 391 U.S. 145, 162

Court-martial defendants tried at a general court-martial,[25] which may impose felony-level punishments,[26] only have a statutory right to a determination of their guilt or innocence by "members panels."[27] Two major differences between these panels and juries lower the burden to achieve a conviction in a successive court-martial.

First, general courts-martial may convict a defendant with a lower percentage of members voting for conviction than any of the fifty states allow for a felony jury verdict. Congress currently requires only "two-thirds of the members" to vote for conviction, in order for a panel to find a court-martial defendant guilty of any offense, except spying.[28] The changes Congress passed in the Military Justice Act (MJA) of 2016[29] still only require three-fourths of the members

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(1968) (incorporating most of the Sixth Amendment right to a jury trial against state governments trying defendants for serious criminal cases).

[25] A general court-martial may "adjudge any punishment not forbidden by" the UCMJ, "including the penalty of death when specifically authorized." 10 U.S.C. § 818 (2012).

[26] Military courts have recognized this analogy between offenses tried at general courts-martial and "felony offenses." *United States v. Mitchell*, 58 M.J. 446, 448 n.3 (C.A.A.F. 2003) (quotation and citation omitted).

[27] 10 U.S.C. § 816 (2012). A defendant also has the right, in a non-capital case, to elect trial by judge alone. *Id.*

[28] *Id.* § 852(a)(2) (2012). The only offense requiring a unanimous vote for conviction is that "for which the death penalty is made mandatory." *Id.* § 852(a)(1). The only such offense, spying, *see id.* § 906, is an offense federal in nature.

[29] FY 2017 NDAA, §§ 5001-5542, 130 Stat. at 2894-2968. These MJA amendments "take effect on January 1, 2019." Exec. Order No. 13,825, 83 Fed. Reg. 9889, 9889 (Mar. 1, 2018).

(on a general court-martial panel that will be required to have eight members) to vote for conviction.[30]

By contrast "only two states," Oregon and Louisiana, permit any felony "convictions on less-than-unanimous jury verdicts."[31] Even these states require unanimity in at least some murder trials; and for all felonies, they require *more* than three-fourths of jurors to vote for conviction for a guilty verdict.[32]

The second jury right court-martial defendants lose in a successive court-martial is the right to a jury pool representative of the community where the alleged crime occurred. A court-martial defendant has "no right to have a court-martial be a jury of peers, a representative cross-section of the community, or

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[30] FY 2017 NDAA, § 852, 130 Stat. at 2916 (modifying 10 U.S.C. § 852(a) to require the "concurrence of at least three-fourths of the members" for a court-martial conviction).

[31] Aliza B. Kaplan and Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 6 (2016); *accord* Ashley Garcia, *Patching the Exhaust Pipe: A Historical Analysis Of Oregon's Non-Unanimous Jury Law in Criminal Cases*, 54 WILLAMETTE L. REV. 113, 135 (2017) (citing Mat dos Santos, AMERICAN CIVIL LIBERTIES UNION OF OREGON, *Non-Unanimous Jury Convictions Violate Equal Protection Clause* (Dec. 15, 2016) https://www.aclu-or.org/en/cases/non-unanimous-jury-convictions-violate-equal-protection-clause ("Only two states allow non-unanimous juries to deliver felony convictions: Oregon and Louisiana.")).

[32] La. CONST. art. I, § 17 (requiring a 10-2 vote for conviction in non-capital felony criminal cases); Kaplan and Saack, *supra* note 31 (citing OR. REV. STAT. § 136.450(1) (2015) (requiring a 10-2 vote for conviction "in a criminal action," except for "murder or aggravated murder").

randomly chosen."[33] The convening authority—the defendant's commanding officer—selects ("details") the military personnel who, after the court screens them for bias in the *voir dire* process, serve as the panel members for the defendant's case.[34]

The convening authority may detail, subject to very few restrictions, those who are "in *his [or her] opinion* . . . best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[35] The convening authority does not have to detail a representative group of members based on criteria of race, gender, or religion,[36] nor does the group of members have to be representative of a variety of military ranks or

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[33] *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004).

[34] 10 U.S.C. § 825 (2012) (describing detailing process); R.C.M. 912 (rules for *voir dire* screening for bias).

[35] 10 U.S.C. § 825 (emphasis added). A commissioned officer defendant must have an all commissioned officer panel; an enlisted defendant cannot be tried by a member of his immediate unit, and may require (absent "physical conditions or military exigencies") at least one-third of panel members to be enlisted. *Id.* Also, "[w]hen it can be avoided, no" defendant "may be tried by a court-martial any member of which is junior to him in rank or grade." *Id.* A convening authority cannot detail members on criteria outside Section 825 (i.e. gender), *United States v. Riesbeck*, 77 M.J. 154, 158-59 (C.A.A.F. 2017); solicit volunteers, *Dowty*, 60 M.J at 176; or, purposefully detail "members of senior grades or ranks to achieve a desired result," *United States v. Bertie*, 50 M.J. 489, 492 (C.A.A.F. 1999).

[36] *United States v. Gooch*, 69 M.J. 353, 356, 359 (C.A.A.F. 2010) (finding that absent proof of "improper motive" to exclude members based on race, a convening authority could use screening criteria precluding the detail of almost all members of Lieutenant Colonel Gooch's minority racial group to his trial).

occupations.[37]

By contrast, both state court and federal court defendants have a "fundamental" constitutional right to the "selection of a petit jury from a representative cross section of the community."[38] This Court has noted that a jury's "purpose" to "guard against the exercise of arbitrary power" is "not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[39]

Two recent examples show how the lack of strong jury rights in a court-martial allows "the two components of our federal system" to use successive courts-martial "to conspire together to deprive an individual of liberty where a single government would be powerless to do so."[40] The first case is that of Army Private Seth Lemasters, first tried in Gloucester County, Virginia, for rape "by force or threat in violation of Virginia law. A jury acquitted [Private Lemasters] of the charge and the court ordered him released from civilian confinement."[41]

Private Lemasters' liberty should have been

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[37] *United States v. Roland*, 50 MJ 66, 69-70 (C.A.A.F. 1999) (convening authority need only establish that he or she considered detailing members from all ranks or occupations).
[38] *Taylor v. Louisiana*, 419 U.S. 522, 528-30 (1975).
[39] *Id.* at 529.
[40] Reply Brief, *supra* note 22, at 8.
[41] *United States v. Lemasters*, No. 20111143, 2013 WL 6913001, at *1-2 (A. Ct. Crim. App. Dec. 31, 2013), *rev. denied*, 73 M.J. 408 (C.A.A.F. 2014).

preserved by Virginia's requirement that a jury—drawn from the district where the alleged crime occurred—unanimously find that the prosecution met its burden of proof.[42] However, Virginia prosecutors played another card: the separate-sovereigns exception. They had "discussed [Private Lemasters'] case with the military trial counsel and appellant's company commander," ensuring that these officers "were present during the civilian trial," and then:

> At the conclusion of the trial, [Private Lemasters] was turned over to his company commander, who . . . ordered him into pretrial confinement. Fourteen days later charges were preferred against [him]. He was eventually tried by court-martial and convicted by an officer and enlisted panel of the aggravated sexual assault. . . .[43]

The second case is that of Navy Chief Rodney Williams. After finding Chief Williams guilty of voluntary manslaughter, a Virginia jury sentenced[44]

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[42] VA CONST. Art. I, Sec. 8 ("That in criminal prosecutions a man hath a right . . . to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.").

[43] *Lemasters*, 2013 WL 6913001, at *2.

[44] *See* VA CODE ANN. § 19.2-295.1 (2012) ("In cases of trial by jury, upon a finding that the defendant is guilty of a felony. . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury . . . . If the jury cannot agree on a punishment, the court shall impanel a different jury to ascertain punishment . . . ."). "The trial judge

him to twelve months in prison and a fine.[45] But that was not the end of Chief Williams' ordeal: a Navy prosecutor also attended the state trial,[46] and the Navy court-martialed him for the same acts. The members convicted him of voluntary manslaughter, a verdict requiring only two-thirds of the members to convict, and sentenced him to five years' in jail and a bad-conduct discharge—also on a two-thirds vote.[47]

The separate-sovereigns exception allowed Virginia to accomplish with military assistance what it could not alone—imprison Private Lemasters for ten years after his acquittal by a Virginia jury, and imprison Chief Williams for five additional years—for cases found wanting by juries requiring unanimity. This Court should overrule the separate-sovereigns exception. It allows for retrial at a court-martial requiring fewer factfinders to be convinced beyond a reasonable doubt of guilt or punishment after the military gets a free preview of the defendant's case.

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may reduce a sentence but may not exceed the 'maximum punishment' fixed by the jury," making the jury sentence a binding maximum requiring unanimity. *Batts v. Commonwealth*, 515 S.E.2d 307, 315 (Va. Ct. App. 1999).

[45] Corinne Reilly, *Killer again charged with murder, this time by Navy*, THE VIRGINIAN-PILOT (Jul. 9, 2011), https://pilotonline.com/news/military/article_a569a3a8-e9cf-51c1-8bdb-1a8968805a08.html ("[Chief] Williams . . . was . . . . Guilty of voluntary manslaughter, the jury said, punishable by up to a decade in prison. But when the panel came back . . . with a sentencing recommendation, it suggested . . . 12 months, and a . . . fine.").

[46] *United States v. Williams*, No. 201200248, 2013 WL 1808733 at *2 (N-M. Ct. Crim. App. Apr. 30, 2013), *rev. denied*, 72 M.J. 456 (C.A.A.F. 2013).

[47] *Id.* at *1; *see* 10 U.S.C. § 852(c) (requiring two-thirds verdict for sentences less than death, and more than ten years' in jail).

B. Unlike the DOJ's *Petite* Policy, which places uniform limits on successive federal prosecutions, the military departments place non-uniform and insubstantial restrictions on successive courts-martial.

Unlike the different United States Attorneys' offices, each military department has its own policy on successive courts-martial. Most require no higher level of approval for a successive court-martial than for an ordinary general court-martial. And unlike the DOJ, no military department requires approval of a successive prosecution by an attorney.

1. No department follows the DOJ's *Petite* Policy of requiring a high-level attorney to approve a successive prosecution.

Three military departments only require approval from a general court-martial convening authority ("GCMCA")—a non-lawyer—for successive courts-martial: the Army,[48] Navy and Marine Corps,[49]

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[48] DEP'T OF THE ARMY, Army Regulation ("AR") 27-10 Legal Services: Military Justice, at 29, Ch. 4, ¶ 4-1 (May 11, 2016), *available at https://armypubs.army.mil/ProductMaps/PubForm/AR_Details.aspx?ID=0902c8518003514c* (providing that for "disciplinary proceedings subsequent to exercise of jurisdiction by civilian authorities," the officer "exercising [general court-martial] jurisdiction, may, at that officer's discretion, dispose of such charges or, by endorsement, authorize" a successive special or general court-martial).

[49] JAGMAN, *supra* note 18, §§ 0124(a), (c)(1) (requiring that when "a person in the Naval service has been tried in a state" court," no such case "for the same act or acts" will "be referred for trial by court-martial . . . without the prior permission of the first

and Coast Guard.[50] Only the Air Force requires a senior civilian—the Secretary of the Air Force—to approve all successive courts-martial.[51]

Across the DOD, a GCMCA already has to approve referral of *any* case to a general court-martial—the only court-martial authorized to impose felony-level punishments[52] and to try all penetrative sexual assault offenses.[53] The Army, the Navy and Marine Corps, and in most circumstances the Coast Guard,[54] require *no* additional approval for successive

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GCMCA over the member"). Since enacting this version of the instruction in 2007, the Navy only requires notification by a Navy GCMCA to the Office of the Judge Advocate General. *Id.*

[50] UNITED STATES COAST GUARD, COMDTINST M5810.1F, 60-61, ¶ 4.D.1 (Mar. 2018), *available at* https://media.defense.gov/2018/Apr/06/2001900284/-1/-1/0/CIM_5810_1F.PDF ("No person in the Coast Guard may be tried for the same acts . . . for which the accused has been tried or is pending trial by [a] state . . . without first obtaining authorization from the appropriate Area Commander *or* [Deputy Commandant for Mission Support] DCMS."). Both Area Commanders, and the DCMS, are GCMCAs in the Coast Guard. *Id.* at 64 ¶ 5.A.

[51] DEP'T OF THE AIR FORCE, Air Force Instruction ("AFI") 51-201, at 35 2. ¶ 18.3 (Dec. 8, 2017), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf ("Only the Secretary of the Air Force may approve initiation of court-martial . . . against a member previously tried by a state or foreign court for substantially the same act or omission, regardless of whether the member was convicted or acquitted . . . .").

[52] *See supra* notes 25 and 26.

[53] *See* 10 U.S.C. § 818 (2012) (stating that "only general courts-martial have jurisdiction over an offense specified in section 856(b)(2)," which includes penetrative offenses against adults and children under 10 U.S.C. §§ 920(a)-(b), 920b, 925).

[54] Though Coast Guard Area Commanders—uniformed officer GCMCAs—do not have to obtain additional permission, the

courts-martial against those accused of serious criminal offenses.

In contrast, the DOJ requires under its *Petite* Policy that any successive "prosecution must be approved by the appropriate Assistant Attorney General."[55] In *Rinaldi v. United States*, the DOJ honored the *Petite* Policy by moving to dismiss the federal conviction of Rinaldi, where the trial counsel "had not obtained the requisite approval" from the appropriate Assistant Attorney General.[56]

This Court noted that "the overriding purpose of the *Petite* Policy is to protect the individual from any unfairness associated with needless multiple prosecutions."[57] By requiring the lower court to allow withdrawal of Rinaldi's conviction—without itself examining whether the facts and circumstances of the successive prosecution met the *Petite* Policy—this Court vindicated the importance of obtaining high-level approval before a successive prosecution.

The *Petite* Policy constrains almost all federal "charging decisions" after a state prosecution.[58] It applies even if a prior state prosecution resulted in "dismissal or other termination of the case on the

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Coast Guard does have non-Area Commander GCMCAs, who must ask an Area Commander for permission. *Supra* note 50.

[55] *USAM*, *supra* note 9, § 9-2.031.

[56] 434 U.S. 22, 24 n.5, 24-25 (1977).

[57] *Rinaldi*, 434 U.S. at 31.

[58] *USAM*, *supra* note 9, § 9-2.031(B) (excepting cases "where the prior [state] prosecution involved only a minor part of the contemplated federal charges").

merits after jeopardy has attached," short of a conviction or acquittal.[59] Jeopardy attaches in civilian courts when the "jury is empaneled and sworn," or after "the first witness is sworn" in a bench trial.[60]

Substantively, the *Petite* Policy first requires a showing that the criminal "matter . . . involves a substantial federal interest."[61] Matters "within the national investigative or prosecutorial priorities established by the Department are more likely than others to satisfy this requirement."[62]

Second, "the prior prosecution" must have "left that [substantial federal] interest demonstrably unvindicated," for instance, by imposing a sentence "manifestly inadequate in light of the federal interest involved."[63] This must overcome a "presumption" that the "prior prosecution, regardless of result, has vindicated the relevant federal interest."[64]

Finally, the *Petite* Policy requires that "the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact" under a beyond reasonable doubt standard.[65]

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[59] *USAM* § 9-2.031(B)-(C).
[60] *Crist v. Bretz*, 437 U.S. 28, 37 n.15, 38 (1978).
[61] *USAM*, *supra* note 9, § 9-2.031(A).
[62] *Id.* § 9-2.031(D).
[63] *Id.* § 9-2.031(A).
[64] *Id.* § 9-2.031(D).
[65] *Id.* § 9-2.031(D) (citing *id.* § 9-27.220, comment ("[N]o prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.")).

2. Most military departmental limits on successive prosecutions are insubstantial compared to the DOJ's *Petite* Policy.

The Air Force has the most restrictive policy on successive prosecutions—authorizing them in "only the most unusual cases when justice and good order and discipline can be satisfied in no other way."[66] However, neither the Air Force nor other departments follow the *Petite* Policy conditioning a successive prosecution on admissible evidence probably sufficient to prove charges beyond reasonable doubt.[67]

The Army's successive court-martial regulation is less protective of an accused's rights than the *Petite* Policy. It does not presume that a state trial satisfies a military disciplinary interest.[68] Also, the Army only applies this policy to state trials where jeopardy attached "within the meaning of UCMJ, Art. 44."[69]

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[66] AFI 51-201, *supra* note 51, at 35, ¶ 2.18.3.

[67] Even after recent Congressional amendments, the advice from judge advocate prosecutors to the convening authorities who make all charging decisions, including successive courts-martial, is and will remain "*nonbinding*." *See* FY 2017 NDAA, § 5204, 130 Stat. at 2906-07 (amending 10 U.S.C. § 833 to require judge advocates to provide "non-binding guidance" to convening authorities based in part on the principles in the *United States Attorneys' Manual*, *supra* note 9, § 9-2.031(B)).

[68] *See* AR 27-10, *supra* note 48, at Ch. 4 ¶ 4-2 (stating that a soldier "who has been tried in a civilian court may, but ordinarily will not, be tried by court-martial . . . for the same act over which the civilian court has exercised jurisdiction," if the soldier's GCMCA "personally determine[s] that" a court-martial "is essential to maintain discipline in the command").

[69] *Id.* at 29 (citing 10 U.S.C. § 844 (2012)).

Jeopardy does not attach in a court-martial with a members panel until after introduction of evidence,[70] making the Army rule less protective of a military accused than the civilian protection in *Crist v. Bretz*.[71]

The Department of the Navy claims to restrict successive courts-martial to "unusual cases" where they are "essential in the interests of justice, discipline, and proper administration within the Naval service."[72] However, it also requires only one of three "criteria" for a GCMCA to approve a successive court-martial: that the "civilian proceedings concluded without conviction for any reason than acquittal," that a "unique military interest was not or could not be adequately vindicated," *or* that the "conduct leading to trial before a State . . . court has reflected adversely upon the Naval service."[73]

One author has observed that "[t]his last category" in the Navy successive courts-martial instruction seems to swallow the rule" because "virtually every crime reflects adversely upon the military."[74] The first category in this Navy regulation, that the "civilian proceedings concluded without conviction for any reason other than acquittal, is also broader than the *Petite* Policy in that the Navy

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[70] *United States v. Easton*, 71 M.J. 168, 170 (C.A.A.F. 2012).
[71] 437 U.S. at 37 n.15.
[72] JAGMAN, *supra* note 18, §§ 0124(a).
[73] *Id.* § (b) ("Referral for trial . . . within the terms of this policy shall be limited to cases that meet one or more . . . criteria[.]").
[74] Major Charles L. Prichard, Jr., *The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions*, 414 ARMY LAWYER 1, at 19 (Nov. 2007).

suggests that *any* incomplete civilian proceeding, including those in which jeopardy attached, could justify a successive court-martial.

Although the Coast Guard requires "complete justification as to why deviation from the general policy against second trials is appropriate,"[75] it "does not detail what the justification should include or what types of cases or circumstances might justify a successive prosecution."[76]

The typical military combination of a low-level for approval requiring little explanation leads to successive courts-martial without adequate justification. One author notes that in the case of Army Staff Sergeant David Tillery—tried in a successive court-martial after a trial judge dismissed a North Carolina state murder charge for "lack of evidence"[77] after a jury was empaneled—the "GCMCA testified that he felt punitive action was necessary, giving no further explanation" as to why he needed to convene a successive court-martial.[78] Staff Sergeant Tillery went from no criminal conviction, to serving a life sentence after his successive court-martial.[79]

In the case of Chief Williams, the Navy appears

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[75] COMDTINST M5810.1F, *supra* note 50, at 60-61 ¶ 4.D.1.
[76] Prichard, *supra* note 74, at 19.
[77] WRAL.COM, Man Accused of Murdering Lover's Husband Faces Court Martial (May 12, 2003), https://www.wral.com /news/local/story/105214/.
[78] Prichard, *supra* note 74, at 18 n.202 (citation omitted).
[79] *Tillery v. Shartle*, No. CV 16-0204-TUC-CKJ (LAB), 2016 WL 7229139, at *2 (D. Ariz. Dec. 14, 2016).

to have based its decision to successively court-martial him, at least in part on his choice of wardrobe during his state trial: his Navy uniform.[80] This sounds more like petty revenge, than of a substantial, unvindicated federal interest that would have been required under the *Petite* Policy.

3. The military departments do not enforce their proclaimed policies against successive prosecutions to the degree that the DOJ enforces the *Petite* Policy.

The DOJ, in *Rinaldi* and in many other cases,[81] has moved to vacate convictions after United States Attorneys have conducted successive prosecutions without following the *Petite* Policy. Though lower courts have held that defendants cannot force the DOJ to follow the Policy,[82] the Policy itself provides that with very few exceptions, the "United States will move to dismiss any prosecution governed by this policy in which prior approval was not obtained."[83]

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[80] *Williams*, 2013 WL 1808733 at *2 (noting Navy prosecutor at the state trial "later opined that the presence of the appellant in uniform and additional chief petty officers in uniform in the gallery had an untold impact on the jury members").

[81] *E.g.*, *Thompson v. United States*, 444 U.S. 248, 249 (1980) (per curiam) (listing cases).

[82] *United States v. Snell*, 592 F.2d 1083, 1088 (9th Cir. 1979) (noting a "defendant cannot invoke the *Petite* Policy as a bar").

[83] *USAM*, *supra* note 9, § 9-2.031(E) (excepting only unauthorized successive prosecutions where first, "the Assistant Attorney General retroactively" finds "that there [are] unusual or overriding circumstances justifying retroactive approval; and second, the prosecution would have been approved had approval been sought in a timely fashion").

In contrast to the *Petite* Policy, none of the military departments require dismissal of a court-martial conviction where a convening authority fails to comply with a departmental regulation. There are numerous examples of convening authorities simply disregarding departmental regulations,[84] with no remedial action by the government.[85] This shows that, unlike the DOJ's policy and practice, there is no meaningful constraint on the military's use of successive courts-martial. Accordingly, this Court should overrule the separate-sovereigns exception which enables this arbitrary government action.

II. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED BECAUSE IT ALLOWS FOR CONTINUED HARASSMENT BY SUCCESSIVE COURTS-MARTIAL OF RETIRED MILITARY, AND OF ACTIVE DUTY MILITARY WHOSE ENLISTMENTS ARE INVOLUNTARILY EXTENDED.

Military jurisdiction is status-based. Congress has subjected to military jurisdiction, among others,

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[84] *E.g.*, *Kohut*, 44 M.J. at 246-50 (convening authority failed to follow Navy JAGMAN instruction then in effect required the GCMCA to get "permission of the Judge Advocate General" to court-martial Fireman Kohut for assaults previously "the subject of a state criminal proceeding"); *United States v. Culpepper*, No. ACM 34058, 2002 WL 13154 at *2 (A.F. Ct. Crim. App., Dec. 11, 2001) (convening authority failed to obtain required permission from the Secretary of the Air Force to conduct court-martial for larceny of stolen property already subject to a state conviction).

[85] In fact, after *Kohut*, the Navy relaxed its rules for successive courts-martial, changing the JAGMAN to require notification by a GCMCA, rather than seeking approval. *See supra* note 18.

those on active duty, those retired from the active duty military, and those reservists on active duty.[86]

The successive sovereigns exception unjustly allows the military to prosecute an active duty retiree previously tried by a state court, even though this retiree's only real connections to the military are (1) the theoretical ability to be recalled to active duty,[87] and (2) a monthly pension.[88] In *Hennis*, the Army convened a successive court-martial twenty-one years after acquittal by a state court, and two years after his retirement.[89] As one author asked: "[w]hat special interest does the Army have in prosecuting someone who was no longer in the military for a twenty-one year old crime, especially when the Army did not pursue a court-martial when the crime occurred?"[90]

A. The military routinely places active duty members on "legal hold" to involuntarily extend enlistments for a court-martial.

An enlisted member of the military's contract ends on a specified date. However, for a member of the active duty forces to be discharged from an enlistment, he or she generally must first: (1) receive delivery of a valid discharge certificate; (2) have a

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[86] 10 U.S.C. § 802 (2012).
[87] 10 U.S.C. § 688 (2012) (allowing retiree recall in emergency).
[88] *See generally Barker v. Kansas*, 503 U.S. 594, 605 (1992) (holding that "[f]or purposes of [taxation], military retirement benefits" are "considered deferred pay for past services").
[89] 75 M.J. at 802.
[90] Prichard, *supra* note 74, at 16.

final accounting of pay; and (3) complete the 'clearing' process required under service regulations.[91]

Each department has regulations authorizing commands to stop the discharge of a member,[92] if they take an "action with a view to trial"—apprehension, imprisonment, "preferral of charges,"[93] or even just a "[c]riminal investigation[.]"[94] These regulations place a member in a "legal hold" status. There, they are still subject to court-martial while "awaiting discharge after expiration of [the] terms of enlistment."[95]

While on a legal hold, a member does not receive pay if placed in pretrial detention pending court-martial (unless later acquitted by court-martial).[96] Often the military imprisons or stations these members at distant bases, long after the member's enlistment contract has expired.

For instance, in *United States v. Webb*, Senior Airman Webb's enlistment expired October 23, 2008.[97]

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[91] *See United States v. Christensen*, 78 M.J. 1, 5 (C.A.A.F. 2018) (citing 10 U.S.C. § 1168 (2012)).

[92] *E.g.*, DEP'T OF THE NAVY, MILITARY PERSONNEL MANUAL (MILPERSMAN) § 1160-050, at 6, 8-9 (2007) (authorizing both "[i]nvoluntary extension[s]" of an enlistment "due to criminal proceedings," and "extension[s] for completion of U.S. civilian criminal proceedings").

[93] R.C.M. 202(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016).

[94] 67 M.J. 765, 766 (A.F. Ct. Crim. App. 2009).

[95] 10 U.S.C. § 802(a) (2012).

[96] *United States v. Fischer*, 61 M.J. 415, 421-22 (C.A.A.F. 2005).

[97] *Webb*, 67 M.J. at 766.

Even though the Air Force issued his discharge paperwork and a final accounting of pay, a military judge found continuing court-marital jurisdiction over Senior Airman Webb because his command started a criminal investigation and placed him on legal hold seven days before his enlistment was to end.[98]

B. The separate-sovereigns exception allows the military to place members facing state trials on "legal hold" for successive courts-martial, long after their enlistments expire.

The separate-sovereigns exception allows the military to take actions "with a view to trial" against members facing a state prosecution, and thereby retain them on legal hold even after their enlistments expire. For instance, in *United States v. Burke*, Kentucky charged Army Sergeant Burke four times with a double murder.[99] After four mistrials between 2007-2011, the State gave up.[100] Sergeant Burke's "enlistment [had] ended while he was in the custody of civilian authorities."[101] However, because of the Army's ability to place Sergeant Burke on legal hold:

> Burke was never processed out of the

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[98] *Id.* at 768-69, 772.

[99] *United States v. Burke*, No. 20120448, 2015 WL 5472729, at *1 (A. Ct. Crim. App. Feb. 26, 2015), *aff'd*, 75 M.J. 26 (C.A.A.F. 2015).

[100] *Id.*

[101] Charles Gazaway, *Military panel finds murder suspect Brent Burke guilty on all charges*, WAVE 3 NEWS (May 8, 2012), http://www.wave3.com/story/18184922/military-panel-reaches-finding-in-court-martial-of-double-murder-suspect-brent-burke.

> Army [and] still considered to be on active duty. He was taken into custody by military police and returned to Fort Campbell where the government filed the murder charges against him. He was held in . . . [j]ail while awaiting general court-martial."[102]

The Army charged and convicted Sergeant Burke for double murder, among other charges, long after his enlistment had expired.[103]

In *United States v. Christensen*, Private First Class Christensen's command had mailed his discharge paperwork and processed him out of the Army.[104] However, when civilian authorities jailed him on suspicion of sexual assault, a senior prosecutor requested the Army suspend the final accounting of Christensen's pay, testifying that he wanted to maintain military jurisdiction so he could "confirm that the civilians were going to prosecute this [sexual assault case] in a way that we felt was appropriate."[105]

After civilian authorities discussed allowing Private First Class Christensen to plead to a lesser charge, the Army court-martialed him.[106] Though the CAAF vacated the conviction for lack of jurisdiction,[107] the senior prosecutor's testimony exemplifies how the military uses the separate-sovereigns exception and

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[102] *Id.*
[103] *Burke*, 2015 WL 5472729, at *1.
[104] 78 M.J. at 2-3.
[105] *Id.* at 3, n.2.
[106] *Id.* at 3.
[107] *Id.* at 6.

successive courts-martial to exploit discharge criteria. It also shows how the separate-sovereigns doctrine makes it practically impossible for a military defendant to reach a plea deal protecting his interests in a state trial, where the military can retain the defendant and try the same acts by court-martial even long after an enlistment ordinarily should have ended.

In the case of Petty Officer Greening, the Navy engaged in a similar course of conduct. The Commonwealth of Virginia indicted Petty Officer Greening for an accidental shooting on August 7, 2013.[108] After his enlistment expired and while Virginia's proceedings continued, military authorities involuntarily "extended [him] on active-duty[.]"[109]

Even though military authorities did not clarify that the extension was for the purpose of a successive court-martial—thereby failing to comply with Navy internal regulations for nearly a year—the military court held that Petty Officer Greening suffered no harm because the Navy's legal hold regulations were not intended to "protect" his "rights."[110] Petty Officer Greening "entered into a plea agreement with the Commonwealth to involuntary manslaughter," and received "three years' confinement, with two years and six months suspended."[111]

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[108] *Greening*, 2018 WL 154779, at *1.
[109] *Id.* at *2. Petty Officer Greening initially signed "voluntar[y]" requests to stay on active duty, but after he later refused to sign additional such requests, his command required him to sign involuntary extensions of his active duty enlistment. *Id.*
[110] *Id.* at *5 (citing *Kohut*, 44 M.J. at 250).
[111] *Id.* at *1.

After Petty Officer Greening's release from jail, the Navy jailed and successively court-martialed him for involuntary manslaughter because of his status as an involuntarily extended active duty member of the military. He pleaded guilty, again: and received jail time again—thirty-nine months' confinement from the Navy, with no portion suspended.[112]

These cases demonstrate how the military exploits the separate-sovereigns exception to involuntarily retain members on active duty for successive courts-martial. As this Court noted in *Bartkus v. Illinois*, "at some point the cruelty of harassment by multiple prosecutions by a State . . . offends due process."[113] Being involuntarily retained in the military for a successive court-martial, or successively court-martialed as a retiree are points at which this harassment is unjustifiable, and which support repeal of the separate-sovereigns exception.

III. THE FACTUAL PREMISE FOR TRIAL BY COURT-MARTIAL UNDER THE SEPARATE-SOVEREIGNS EXCEPTION IS OBSOLETE, CONTRARY TO THE FRAMERS' INTENT, AND SHOULD BE OVERRULED.

A. Using the separate-sovereigns exception for successive courts-martial is inconsistent with the Framers' intent.

As the Court noted in *Reid v. Covert*, during

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[112] *Greening*, 2018 WL 154779, at *1.
[113] *Bartkus v. Illinois*, 349 U.S. 121, 127 (1959).

the "lifetime" of "those who wrote the Constitution," court-martial jurisdiction in Great Britain was incredibly narrow—it had not even covered the right to "try soldiers for any offenses in time of peace."[114] Indeed, "the trial of soldiers by courts-martial and the interference of the military with the civil courts aroused great anxiety and antagonism not only in Massachusetts but throughout the colonies."[115]

The Articles of War originally authorized jurisdiction over only "offenses against civilians" of a military nature, and further restricted this to where "no application for a civilian trial was made by or on behalf of the injured civilian."[116] These Articles, enacted by the Continental Congress and used through passage of the Constitution and Bill of Rights[117] required military authorities to "deliver over" to "the civil magistrate" any "officer or soldier" who "committed any offense against the persons or property of the good people of any of the United American States," or else the military authorities themselves would be punished.[118]

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[114] 354 U.S. 1, 23 (1957) (discussing English common law traditions prior to 1713) (four-vote majority). *But see Solorio v. United States*, 483 U.S. 435, 443 (1987) (stating that the British Articles of War of 1774 "had jurisdiction over offenses punishable under civil law") (citation omitted).

[115] *Reid*, 354 U.S. at 28.

[116] *Solorio*, 483 U.S. at 444.

[117] *See* Act of Sept. 29 1789, Ch. 25, 1 Stat. 95 (passing Articles of War into law, in the first session of the first Congress).

[118] W. WINTHROP, MILITARY LAW AND PRECEDENTS 964 (2d ed. 1920) (quoting American Articles of War of 1776, § X, Art. 1 (Sept. 20, 1776)).

This Court noted in *Reid* that "[i]t was not until 1863 that Congress" greatly expanded the jurisdiction of courts-martial when it "first authorized the trial of *soldiers, in wartime,* for *civil crimes* . . . by courts-martial."[119]

However, even after this great expansion of court-martial jurisdiction, the "prohibition on double jeopardy" largely continued to "protect[the] liberty" of servicemembers "from government overreach."[120] Colonel Winthrop, referred to by this Court as the "Blackstone of Military Law,"[121] wrote in his 1920 treatise that the "plea of former trial for the same offense"—double jeopardy—*did preclude successive courts-martial* for these civil crimes:[122]

> [A] soldier convicted by a general court-martial, under Art. 21 or 22, of an offering of violence or mutinous act which resulted in the killing of a superior officer, would remain liable to an indictment for murder in a State or U.S. Court, on account of the homicide involved; and vice versa. [But w]here indeed the offenses are crimes of which military courts are invested with jurisdiction concurrently with the

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[119] 354 U.S. at 23 n.42 (emphasis added, citation omitted).

[120] Amicus Brief of Constitutional Accountability Center and Cato Institute at 7, *Gamble v. United States*, No. 17-646 (Dec. 4, 2018) (citation omitted).

[121] *Ortiz*, 138 S. Ct. at 2175.

[122] W. WINTHROP, *supra* note 118, at 259-65.

> criminal courts, (as for example, the crimes cognizable by courts-martial under Art. 58,[123] in time of war) the same are not distinct but identical in law, *and an acquittal or conviction of one of such offenses . . . in a civil court, will be a complete bar to a prosecution of the same in a military court, and vice versa.*[124]

In other words, the civilian trial for murder would not preclude a court-martial for mutiny—a uniquely military offense. However, the civilian trial would bar a successive court-martial for murder. This is because murder was a "common law" offense,[125] only punishable by court-martial in wartime under the Fifty-Eighth Article of War. Unfortunately, by the time this Court fully embraced the separate-sovereigns exception in the 1950s,[126] military courts

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[123] WINTHROP, *supra* note 118, at 666-67 ("Art. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault, and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punished by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory or District in which such offense may have been committed.").

[124] *Id.* at 264-65 (emphasis added).

[125] *Id.* at 671.

[126] *See* Reply Brief, *supra* note 22, at 12 ("The [separate-sovereigns] doctrine fully crystallized in a pair of 1959 cases, *Bartkus*, 359 U.S. 121, and *Abbate*, 359 U.S. at 196, which

"lost the plot" of this liberty-preserving distinction.

B. Courts-martial have transformed from summarily punishing military offenses to judicially enforcing a comprehensive criminal code duplicative of state law in cooperation with state investigators.

Successive courts-martial should also be found unconstitutional because the "facts have so changed"—from the separate military justice system that existed at the time of the Framers to the integrated system of today—"as to have robbed the old rule of significant . . . justification."[127]

The first changed fact is that court-martial jurisdiction has widely expanded—from trying only military offenses, to trying servicemembers for "garden-variety crimes"—no matter how "unrelated to military service."[128] Court-martial jurisdiction is *even more* expansive than the general federal criminal jurisdiction, which itself "has become so bloated that 'the federal government has [now] duplicated virtually every major state crime.'"[129] Courts-martial may try a defendant for "all disorders and neglects to the prejudice of good order and discipline in the armed

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blessed, respectively, state prosecution following a federal conviction and federal prosecution following a state acquittal.").

[127] Brief for Petitioner at 42 (citing *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992)).

[128] *Ortiz*, 138 S. Ct. at 2174.

[129] Brief for Petitioner at 43 (citing Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997)) (alteration in petitioner's brief).

forces;" for any such acts or omissions which "bring discredit upon the armed forces;" *and*, for *any* non-capital violation of *state* or federal law.[130]

The second changed fact is the heightened degree of state and military cooperation: "military criminal investigators typically work very closely with state investigators when crimes involve both jurisdictions."[131]

This greatly expanded scope of military justice, enforced by deep cooperation between state and military authorities, "makes it particularly easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense . . . the type of government overreach that the Double Jeopardy Clause was adopted to prevent."[132] For instance, in the case of Master Sergeant Hennis, "the state did all the investigative work and seems to have turned to the Army as its agent in carrying out the second trial only because it is constitutionally barred from doing so."[133] And in the case of Staff Sergeant Tillery:

> [T]he state . . . did all the investigative work and handed the cases to the Army six months after [Staff Sergeant]

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[130] 10 U.S.C. § 934 (2012).

[131] Prichard, *supra* note 74, at 16.

[132] Amicus Brief of Constitutional Accountability Center and Cato Institute at 10 (citing Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 9-10 (1995) (noting "the increased level of federal-state cooperation in enforcing criminal laws")).

[133] Prichard, *supra* note 74, at 16.

> Tillery's acquittal and two and a half years after the crime. The Army retried the state's case with the same witnesses, no additional investigation, and with the state's record of trial in the Army prosecutor's hands. Did the Army truly have a special interest separate from the state's, or was this a thinly veiled attempt by the state to prosecute [him] again by using the Army to avoid the Double Jeopardy Clause?[134]

Today's broad court-martial jurisdiction would be unrecognizable to the Framers. The military departments, able to administratively separate—fire for cause—members who committed civilian crimes,[135] do not need to successively court-martial these military members under the separate-sovereigns exception. This exception only serves to cause a "continuing state of anxiety and insecurity"[136] amongst those who, whatever their other failings may be, bravely volunteered to serve our country.

CONCLUSION

This Court should find that the separate-sovereigns exception, which permits the disfavored treatment of servicemembers at successive courts-

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[134] Prichard, *supra* note 74, at 16-1s7.

[135] *See, e.g.*, DEP'T OF THE NAVY, MILPERSMAN, §§ 1900-1999 (governing administrative separations of enlisted sailors); DEP'T OF THE NAVY, Secretary of the Navy Instruction 1920.6C (Sept. 20, 2011) (authorizing administrative separations of naval officers).

[136] Brief for Petitioner at 27 (quoting *Green v.* 355 U.S. at 187).

martial—just because they volunteered to serve our country—is unconstitutional.

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